

Calcutta
High Court Reports

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Quere—Whether a general order passed by the District Magistrate directing that cases occurring in a particular locality should be transferred and heard by the Magistrate of another sub-division, is warranted by section 48 of the Criminal Procedure Code—*TRACOTTA SREKUR v. AMBER MAJEE* ... Vol. X. 239

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evidence—It is improper for the Court in addressing the jury to refer to discrepancies between the evidence given at the trial and statements made to and recorded by the police. The examination of an expert ought generally to be by questions put hypothetically upon facts proved, or to be proved by the evidence of other witnesses—*IN THE MATTER OF ROGHUNI SINGH* Vol. XI. 569

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sections 119 and 126—Police diaries—Refreshing memory—A prisoner has no right to insist that a police diary, if not in Court, shall be sent for, or, if it be in Court, that it be referred to for the purpose of refreshing the memory of a police-officer under examination. *Per WILSON, J.*—A witness cannot be compelled to refresh his memory from any document unless the document is either in the possession of the party who desires to put it to the witness, or is, at least, such as he can insist on having produced. *Reg. vs. Uttamchand Kapurchand*, 11 Bom. H. C. R. 120, approved and explained—*IN THE MATTER OF KALI CHURN CHUNARI* Vol. X. 51

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(Act X. of 1872),

sections 122 and 346—Confession unattested inadmissible—Secondary evidence to prove unattested confession—A prisoner charged with murder confessed his guilt before the Magistrate, who recorded the confession under section 122 of the Code of Criminal Procedure, but omitted to append to the record the proper certificate, or obtain the attestation of the accused by his signature or mark, as required by section 346. The prisoner was finally committed to the Sessions Court for trial. *Held* that the omissions could not be rectified under any

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authority contained in the last clause of section 346 by taking the evidence of the recording officer that the prisoner duly made the statement recorded, and that the confession was not admissible in evidence.—*Reg. vs. Bai Ratan*, 10 Bpm. H. C. R. 166, followed.—*THE EMPRESS v. MUNNOO PANI-OLI* ... Vol. IV. 137

—(Act X. of 1872)—sections 122 and 346—*Confessions—Evidence*.—Section 122 of the Criminal Procedure Code (Act X. of 1872) does not apply to a confession recorded by a Magistrate acting under Chap. XV. or Chap. XVII., but to a confession made by a Magistrate other than the Magistrate by whom the case has to be inquired into or tried, and to a confession made during, or before the commencement of, an investigation by the police.—*IN THE MATTER OF BEHARI HAJDI* ... Vol. V. 238

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—(Act X. of 1872) section 147—*Dismissal of complaint*.—A charge of theft was preferred by the petitioner, on the 7th October 1878, before the

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police, who thereupon instituted inquiries, which subsequently resulted in their finding the charge unproved. Meanwhile, on the 15th October, the charge was repeated in a complaint before the Magistrate of the district, who directed the complainant and his witnesses to attend on a particular day, but subsequently, without having examined them or the complainant, referred the matter to the Sub-Deputy Magistrate. That officer having reported the charge to be false, the Magistrate, on the 9th November, wrote upon the police report, which had meanwhile, on the 26th October, been submitted to him, the following direction, *vis.*, "Show as false." On the 19th November a counter-prosecution, under sections 211, 182, and 500 of the Penal Code, was sanctioned, and eventually, on the 22nd May 1879, resulted in the petitioner being convicted. While the counter prosecution was pending, the petitioner, on the 22nd April, applied to the Magistrate to proceed with his complaint according to law, but was informed that his complaint was dismissed. On the following day the Magistrate recorded the following order: "Dismissed in accordance with my decision recorded in the police report under section 147 of the Criminal Procedure Code."—Held that the complaint had been improperly dismissed, and that the order of the Magistrate, dated 23rd April 1879 must be set aside.—*SHAIKH ERAD ALI v. NUSIBUNNISA BIBIK* Vol. IV. 534

—section 147—see Penal Code section, 211 Vol. V. 1. 289

—(Act X. of 1872), sections 147 and 467—*Penal Code, sections 211, 182, and 500—Sanction to prosecute*.—A charge of theft was made before the police, and while inquiries, which afterwards resulted in the charge being found by the police not to be proved, were pending, the charge was repeated in a complaint before the Magistrate of the District, by whom the matter was handed over to the Sub-Deputy Magistrate, who reported the charge as false. Whereupon the Magistrate directed the police to enter the charge as false, but without ordering the formal dismissal of the petition of the complainant. On the application of the accused, a counter-prosecution, under sections 211, 182, and 500 of the Penal Code, was then sanctioned, and the case sent to the Deputy Magistrate for trial. That officer discharged the accused on the ground that the sanction of the Magistrate was illegal, as there had been, he alleged, (1) no judicial investigation as to the original charge; (2) no formal dismissal

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of the complaint; and (3) the witnesses produced by the complainant had not been all examined. *Held* that the Deputy Magistrate was bound to accept the sanction made by a superior Court as valid and to leave the accused to question it before a competent Court if so advised, that a prosecution may be maintained in respect of a false charge made to the police, or contained in a complaint which has been dismissed under section 147 of the Criminal Procedure Code, although there has been no judicial investigation, and that accordingly the Deputy Magistrate ought to have tried the charge before him—*NUSIBUNNISSA BIBKE v. SHRIKH ERAD ALI* ... Vol. IV. 413

(Act X. of 1872),

sections 147 and 470—Penal Code (Act XLV. of 1860, section 214—Dismissal of complaint without examination of witnesses of complainant—Sanction to prosecute under section 470 of Criminal Procedure Code.—A Magistrate, before whom a complaint had been made, after examining the complainant, but without examining his witnesses, dismissed the complaint under section 147 of the Criminal Procedure Code. Shortly afterwards the person accused, applied to the Magistrate, and obtained sanction, under section 470 of the Criminal Procedure Code, to prosecute the complainant under section 211 of the Penal Code, and proceedings were thereupon commenced before another Magistrate, who subsequently committed the original complainant to the Court of Session. No application was made that a further inquiry might be made notwithstanding the order of dismissal. *Held* that the proceedings in the original complaint had been terminated in a regular manner, and therefore the order sanctioning the prosecution was not illegal by reason of the Magistrate not having examined the witnesses of the complainant.—*SYED, NISSAR HOSSAIN v. RAMGOLAM SINGH*, 25 W. R., Cr., 10, dissented from.—*IN THE MATTER OF GYAN CHUNDER ROY* ... Vol. VIII., 267

(Act X. of 1872),

section 147—see commitment without jurisdiction ... Vol. XI. 55

section 186 and

249—see Cross-Examination, Refusal of right of ... Vol. VI. 63

(Act X. of 1882),

sections 195 and 537—Sanction to prosecute—Omission of—Irregularity—Where a witness was prosecuted for disobedience to a summons without sanction previously obtained under section 195 of the

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Criminal Procedure Code, the High Court refused to interfere, there being no evidence that the want of sanction had occasioned a failure of justice.—*KALLY MOHUN MOOKERJEE v. EMPRESS* ... Vol. XIII. 117

(Act X. of 1872)

sections 216 and 220—see Retrial Vol. III. 131

(Act X. of 1872)

section 218—Witnesses of prosecution, Re-call and cross-examination of—Procedure where accused desires to re-call and cross-examine witnesses of prosecution.—The right of an accused person to recall and cross-examine the witnesses of the prosecution under section 218 of the Code of Criminal Procedure must be exercised at the time when the charge is read and explained to him under the preceding section and, if not exercised at that time, it cannot afterwards be insisted on although, it is in the discretion of the Magistrate to recall the witnesses if he think fit.—*IN THE MATTER OF SHEIKH FAIZ ALI* Vol. VIII. 325

(Act X. of 1872)

section 220—(explanation) and section 221—see commitment, Vol. II. 2

(Act X. of 1872),

section 220—Acquittal—An order dismissing a complaint under section 220 of the Code of Criminal Procedure amounts to an acquittal.—*IN THE MATTER OF JUDUBAR MOOKERJEE* ... Vol. V. 359

(Act X. of 1872),

section 222—see Summary Trial Vol. I. 442

(Act X. of 1872),

section 227—see Summary Trial Vol. II. 374

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and 346—see Examination of Accused Vol. II. 317

section 227—

Sentence of imprisonment and fine—Summary trial—Right of appeal—Duty of Appellate Court—Retrial.—Where a Magistrate of the first class passes a sentence of imprisonment and fine, his order is appealable. He cannot, therefore, in such a case, make up his record in the manner described by section 227 of the Code of Criminal Procedure. It is competent to a Court of Session to order a re-trial of a case which is before it on appeal.—*IN THE MATTER OF SHER MAHOMED AND ANOTHER* ... Vol. II. 571

(Act X. of 1872),

sections 227 and 464—Conviction, Statement of reasons for—Although generally it

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is not necessary, in cases in which no appeal lies, for a Magistrate to record the reasons for passing his judgment, yet under clause (h) of section 227 of the Code of Criminal Procedure, in case of conviction, he ought to enter in the register, to be kept under that section, a brief statement of the reasons for such conviction; but an omission to do so may, under some circumstances, be remedied at a subsequent time.—**IN THE MATTER OF DOWLAT SING** ... Vol. VI. 273

(Act X. of 1872),
section 233—see Assessors
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(Act X. of 1872),
section 237—*Guilty, Plea of—Plea of guilty to be recorded.*—Where a prisoner, on the charge being read and explained to him, pleads guilty the Judge must record the plea under section 237 of the Criminal Procedure Code, and not merely record a narrative of what occurred, and of the statements made by the prisoner. An admission which does not admit all the elements of the charge is not a plea of guilty to the charge.—**GOLAP DHANOK v. EMPRESS** ... Vol. VIII. 471

(Act X. of 1882),
section 247—*Dismissal of prosecution—Complainant, Absence of—"Present in Court"*—A case having been transferred from the file of one Magistrate to that of another was, on the day fixed, called on for hearing, but, the complainant not appearing, the case was dismissed under section 247 of the Criminal Procedure Code. It appeared that the complainant and his witnesses, though not in attendance in the Magistrate's Court, were present in another Court in the same Court-house, being under the impression that his case had been transferred to the Magistrate of that Court. Held that the complainant having been present in the Court-house, the provisions of section 247 of the Code had been improperly applied.—**ROMANATH BAL v. BEHARI BAG BAGDI**. Vol. XIII. 303

(Act X. of 1872),
sections 249 and 349—*Approver, Evidence of—Approver, Trial of, along with his accomplices—Deposition of approver before Committing Magistrate—Procedure on withdrawal of conditional pardon under section 349 of Criminal Procedure Code.*—**PER FIELD, J.**—There is a grave doubt whether the deposition of an approver taken before the Committing Magistrate, may be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon of the approver having been withdrawn. Where a conditional pardon, granted to an approver, is

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withdrawn under section 349 of the Criminal Procedure Code by the Sessions Court, the Judge ought to wait till the conclusion of the trial of the accomplices, and then, before passing judgment on them, if found guilty, proceed against the approver.—**IN THE MATTER OF JOYDEB PARAMANICK** ... Vol. VII. 66

(Act X. of 1872), sections 250, 265—*Riot, Trial of members of opposing factions for—Procedure in trials of members of opposing factions in riots—Consent of pleaders to irregularity in trial—Irrregularity—Examination of accused by Court*—The members of two opposing factions in a riot were committed for trial to the Sessions Court on two distinct and separate commitments. The Judge, who sat with a Jury, having taken the evidence of the witnesses for the prosecution in one case, upon his own suggestion, but with the consent of the pleaders for the accused, postponed the taking of the evidence for the defence in that case, and immediately proceeded before the same Jury to take the evidence for the prosecution in the counter case. This having been done, the Court examined the witnesses for the defence in the first case, and then in the second case. The pleaders for the defence in both cases having addressed the Court, and the Government Pleader having been heard in reply, the Judge summed up the facts in both cases to the Jury, who returned a verdict of guilty in respect of all the accused. Held that the procedure resorted to by the Judge was a violation of the salutary rule that in such cases the trials should be kept entirely distinct; and that the accused having been materially prejudiced by the mode of trial adopted, the trial should be set aside. Held, also, that the consent given by the pleaders for the defence could in no way cure the defect in the arrangement suggested by the Judge. The power allowed by section 250 of the Code of Criminal Procedure authorizing the examination by the Court of an accused does not contemplate his being subjected to cross-examination; and the Judge cannot be allowed, by the method of examination adopted by him, to endeavour to force an accused person to criminate himself. The object of the power entrusted to the Court by the section quoted is to enable the Court, from time to time, to give the accused (especially if undefended) an opportunity to explain, if he desire to do so, any facts which have been spoken to by the witnesses for the prosecution, or, at the close of the case, to obtain from the accused what explanation he may desire to offer regarding facts which, in the opinion of the

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Court, implicate the accused with the offence of which he stands charged. *Reg. v. Sheik Buzu*, 8 W. R. (F.B.) 47, distinguished *Reg. v. Bholanath Sein*, 25 W. R. 57; and *In re Chinibash Ghose* 1 C. L. R. 436, followed.—*HOSSEIN BUKAS SHEIKH v. SHAKIR SHEIKH*. ... Vol. VI. 521

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section 250—see examination of
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(Act of X. of
1882), section 250—*Absence of complain-
ant—Dismissal of warrant case.*—A Magis-
trate is not competent to dismiss a warrant
case, which is not compoundable, because of
the absence of the complainant.—*GOVINDO
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(Act X. of
1872), section 263—*Verdict of Jury—
Jury, Verdict of, whether against weight of
evidence—Duty of Court under section 263
of Act X. of 1872—Weight of evidence—
Jury, when Court may interrogate—Fraudu-
lent use of forged document—Forged docu-
ment when used fraudulently.*—In a refer-
ence under section 263 of the Criminal Pro-
cedure (Act X. of 1872), on the ground that
the verdict of acquittal by a jury is against
the weight of evidence, it is necessary for
the High Court to consider, merely, having
regard to the circumstances which the pro-
secution were bound to prove, whether, on
the evidence, the verdict was such as re-
asonable men ought to have come to. Under
section 263, the Court is authorized to put
to a jury such questions only as are neces-
sary to ascertain what their verdict is.
Accordingly, where a jury returns a plain
simple verdict of "not guilty," whether
that verdict be erroneous or not, it is the
duty of the Court to receive and record it
without asking any questions about it.
Although a person's title to property may
be ever so good, yet, if, in the course of an
action brought against him to obtain
possession of the property, he uses, by way of
supporting his title, though there be no
necessity for doing so, a forged document, he
uses that document fraudulently.—*DHUNNU
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section 263,
Verdict of Jury—*Case referred by Sessions
Judge—Practice of the High Court.*—Where
there are reasons sufficient to warrant a jury
in disbelieving the witnesses, and in giving

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the prisoner the benefit of the doubt raised
by inconsistencies in that evidence, although
another jury might have come to a different
conclusion, the High Court will not inter-
fere. It must be shown that the verdict
of the jury is certainly unreasonable and
perverse.—*The Queen v. Sham Bagdee and
others*, 20 W. R. 73, cited and followed.—
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1872),—sections 260, 351, and
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section 273—
Distinct offences—Conviction—Appeal.—
Where a person is charged with two sepa-
rate offences in one trial, the amount of the
whole punishment awarded for the two
offences must be regarded as one sentence
for the purpose of determining whether an
appeal lies under section 273 of the Code of
Criminal Procedure or not.—IN THE
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(Act X. of
1872) sections 278 and 279—The fact,
that the pleader of the accused is present
in Court when an order is made admitting
an appeal, does not relieve the Court from
the necessity of giving notice to the ap-
pellant of the day fixed for the hearing of
the appeal.—IN THE MATTER OF G O P A L
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(Act X. of
1872 sections 283 and 296—see
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1872), sections 289, 530, and 531
—*Breach of peace—Irregularity*—Act X. of
1882, sections 145, 146, and 537.—Sufficiency
of evidence to justify proceedings under
section 531 of the Criminal Procedure Code
(Act X. of 1872) considered.—*DRO SARUN
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(Act X. of 1882)
section 288—*Accomplice, Evidence of—
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don.—*Quere:* Whether the deposition of an approver taken before the committing Magistrate may be used in the Sessions Court as evidence against accomplices, the approver having retracted his former statement, and the conditional pardon having, in consequence, been withdrawn. See *Joyudee Paramanick*, 7 C. L. R. 66.—*NANHA MALLA v. EMPRESS*. Vol. XIII. 326

sections 289, 292, 303, 342—*Reply, Right of prosecutor to*—*Reference to Books of Science*—*Experts, evidence of*—*Jury, Procedure in case of verdict of, not being unanimous*—*Presumption from fact of accused not calling evidence*—*Cross-examination.*—*Per Curiam:* Although the strict interpretation of sections 289 and 292 of the Criminal Procedure Code warrants the construction that a prosecutor is entitled to reply where the accused has stated, when asked under the former section, that he means to adduce evidence, but on consideration does not do so, yet this was never contemplated by the Legislature, the object of the law being merely to allow each side an opportunity of commenting on the evidence of the other. A Court will exercise a wise discretion in allowing a well-known treatise, such as Taylor on Medical Jurisprudence, to be referred to in cases depending upon medical evidence.—See *Hatim*, 12 C. L. R. 86. In a trial by jury upon charges of culpable homicide not amounting to murder under section 304, and voluntarily causing grievous hurt under section 325, of the Indian Penal Code, where the Sessions Judge, in summing up, clearly contemplated a conviction on the first charge, the jury after a short retirement stated that they were unanimous for an acquittal on the first charge, but were divided on the other charge. The Judge, thereupon, inquired what the majority was, and, on being informed that it was 3 to 2, asked what the verdict of the majority was. The answer was "guilty;" and the Judge at once accepted the verdict. Held that it was not intended that, under section 303 of the Criminal Procedure Code, a Judge, on ascertaining that a jury was not unanimous, should make enquiries to learn the nature of the majority and its opinion, so that he should have an opportunity of accepting or refusing that opinion as a verdict according as it coincided with his own opinion or not. Where, on being asked under section 289 of the Criminal Procedure Code, an accused has stated that he means to adduce evidence, but on further consideration does not do so, the Court is not at liberty to draw a presumption adverse to the accused from the circumstance that he has not adduced evidence. It is not

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competent to the Court, under section 342 of the Criminal Procedure Code, to subject the accused to cross examination. [See *In re Hosain Bupsh Sheikh*, 1 L. R. 6 Cal. 96; (*S. C.*) 6 C. L. R. 527; *In re Noor Bux Kazi*, 1 L. R., 6 Cal 279, (*S. C.*) 7 C. L. R. 385; *Empress v. Behari Lal Bose*, 6 C. L. R. 431.—*HURRY CHURN CHUCKERBUTTY v. THE EMPRESS* ... Vol. XIII. 358

(Act X. of 1872),
section 294—see Magistrate
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(Act X. of 1872),
sections 295, 296—*Reference to High Court*—One of two prisoners, who were tried jointly before a Bench of Magistrates on the complaint of the District Magistrate, appealed to the Sessions Judge, and was acquitted. The District Magistrate thereupon, under sections 296 and 297 of the Criminal Procedure Code, transmitted the proceedings in the case to the High Court, and asked that they might be quashed on the ground that there had been a failure of justice. Held that the Magistrate was not competent to refer the proceedings of a superior Court to the High Court.—*IN THE MATTER OF A. DAVID*. ... Vol. VI. 445

(Act X. of 1872),
section 296—*Revisional Jurisdiction of High Court in criminal matters*—*Collector whether subject to criminal revisional jurisdiction of High Court*—A Collector as such not being subject to the revisional jurisdiction of the High Court in Criminal matters, that Court, in the exercise of such jurisdiction, is not competent to deal with an alleged illegal order made under the Indian Penal Code by a Collector.—*IN THE MATTER OF DIANUT HOSEN*. ... Vol. X. 14

(Act X. of 1872),
section 296—see Interpretation
Vol. II. 263

(Act X. of 1872),
section 296—*Notice to party accused*—*Order directing commitment.*—Before a Court of Session can, under section 296, Code of Criminal Procedure, direct a Magistrate to commit the accused in a "Sessions case" which has been improperly dismissed under section 147, it is bound to give the accused person notice of the application for such an order, so that he may show cause why it should not be passed. *Burdhoo*, 22 W. R. 67; *Nawab*, 24 W. R. 70, followed.—*DEVARKA NATH BHUTTA-CHARYIA and others* ... Vol. I. 93

(Act X. of 1872),
Section 296—"Sessions case."—The term "Sessions case" in section 296 of the Code of Criminal Procedure refers to cases triable

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by a Court of Session only. *Empress v. Kanchan Singh*, I. L. R., 1 All. (F. B.) 413, and *Joy Kurn Singh v. Man Patel*, 21 W. R. 42, followed.—*EMPRESS v. TARACHAND BAGAI* ... Vol. VII. 168

(Act X. of 1872),

section 297—*Improper discharge—Order for trial—Power of High Court.*—In considering whether a person has been improperly discharged by a Magistrate, the High Court, under section 297, Code of Criminal Procedure, is not restricted only to an error in law, but can order a trial where *prima facie* the evidence establishes a case against the accused to which he should be required to enter on his defence. The Sessions Judge was, however, not competent himself to order the trial or inquiry to proceed, but as the order was otherwise a proper order, the High Court in setting it aside revived it as its own order.—*IN THE MATTER OF TROYLOKHYA NATH MITTER AND ANOTHER* ... Vol. I. 83

(Act X. of 1872),

section 297—*Revision—Acquittal—Practice of High Court as to revision in case of acquittal.*—It is not the practice of the High Court to interfere, by way of revision, under section 297 of the Code of Criminal Procedure with an acquittal against which the Government may appeal.—*EMPRESS v. CHEDI RAI* ... Vol. VII. 142

(Act X. of 1872),

section 297—see Penal Code, section 193 ... Vol. III. 527

(Act X. of 1872),

section 303—*Bail—Convicted person—Prisoner—Fine—Joint fine.*—The proper course of procedure under section 303 of the Code of Criminal Procedure is to impose a fine, and out of the fine realized to direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of the section.—A Court of Session, acting under section 296 of the Code of Criminal Procedure has no power to, admit a convicted person to bail.—*Kanhai Sahu's case*, 23 W. R. Crim. 40, cited and followed.—*MOHESH MUNDUL v. BHOLANATH MUNDUL* ... Vol. III. 404

(Act X. of 1882),

section 309—*Summing-up before Assessors—Heads of summing-up.*—The effect of summing up, under the provisions of section 309 of the Criminal Procedure Code, the evidence in a case tried with assessors is to enable the Sessions Judge in a long or intricate case to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion. If, in summing up the evidence, the Judge is unable himself to record the heads of his

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summing-up, he should avail himself of the services not of a pleader for the prosecution, but of a Court officer, or of some independent person. The opinions of assessors should be taken individually, and not through one of their number. Where the Judge considers the evidence against some of the persons accused unworthy of belief, he ought not to acquit them without having first taken the opinion of the assessors.—*SHADULLA HOWLADAR*. Vol. XII. 506

(Act X. of 1882)

sections 310—*Proof of previous convictions—Per Curiam.*—In trials before a Jury or Assessors the record should invariably show that reference to a previous conviction was not made until the accused had been convicted of the subsequent offence.—*KRISTO BEHARI DASS v. THE EMPRESS*. Vol. XII. 555

(Act X. of 1882),

sections 310 (a) and 537—*Irregularity.*—Where in a trial by Jury the Sessions Judge called upon the accused to answer at the same a charge of theft and also a charge of having been previously convicted, the High Court refused to interfere if not appearing that a failure of justice had been caused by the irregularity.—*BEPIN BEHARY SHAHA v. EMPRESS* ... Vol. XIII. 110

(Act X. of 1872),

section 323—see Refreshing memory ... Vol. XII. 233

(Act X. of 1872),

sections 328 and 491—*Evidence recorded partly by one Magistrate and partly by another.*—Notwithstanding the introduction into the section of the words "the accused person" and "conviction," the provisions of section 328 of the Criminal Procedure Code apply to an inquiry instituted under section 491 with a view to enforcing the giving of security against a breach of the peace, and in such a case, where the Magistrate, by whom only part of the evidence has been taken, is succeeded by another Magistrate while such inquiry is pending, the person called upon to show cause why he should not give security may insist, before the latter, upon the recall and re-examination of the witnesses whose evidence has been already taken by the former Magistrate.—*BURDIA KANT v. ROY v. KORIMUDDI MOONSHEE AND OTHERS*. Vol. IV. 452

(Act X. of 1872)

section 330—*Examination of witness by Commission—Appearance of Magistrate to show cause—Letter—Legal Remembrancer.*—Where a rule is issued, directing a Magistrate to show cause, and he wishes to do so, he should apply to the Legal Remem-

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brancer to have an appearance entered for him in the High Court. The fact that a Hindu lady is expected to make false statements is no ground upon which an application to take her evidence on commission should be refused.—*IN THE MATTER OF HUROOONDERY CHOWDHRAIN*. Vol III. 93.

(Act X. of 1882).

section 359—*Act X. of 1872, section 349*—*Pardon, Tender of*—*Withdrawal of pardon*—A pardon granted under section 349 of Act X. of 1872 was withdrawn by the Sessions Judge before the hearing of the whole of the evidence, without proof that the statement made by the person pardoned was inconsistent, except upon most immaterial points, with previous statements by him or contradicted by the evidence, and before any evidence affecting his veracity had been given. *Held* that the pardon had been improperly withdrawn.—*SRINOP v. EMPRESS* ... Vol XII. 226.

(Act X. of 1872).

sections 339, 340—*Evidence not understood by witnesses*—*Admission to bail*—*Sentence to commence at future date*—*Bail*—*Prisoners admitted to, pending appeal*—Section 339 of Act X. of 1872, being for the protection of witnesses only, the fact that witnesses did not understand their depositions when read over, although they may not have required them at the time to be interpreted, affords no ground for an application by the accused to set aside a conviction. Where a Magistrate, after sentencing two prisoners to separate terms of imprisonment, admitted them to bail, in order that they might have the means of appealing, *held* that such admission to bail did not make the previous sentence one to commence at a future time, and consequently illegal. The case of *Kishen Soonder Bhuttacharjee*, 12 W. R., Cr. 47, distinguished.—*IN THE MATTER OF OKHOY KUMAR* ... Vol. VII. 393.

(Act X. of 1872).

section 349—*Order under section 349 of Act X. of 1872*—*Limitation*—*Pardon, Withdrawal of*—*Per MITTAR, J.*—The power of a Sessions Court to make an order under section 349 of Act X. of 1872, withdrawing a pardon, must be exercised before judgment has been passed. Accordingly, where a Sessions Judge, at the end of his judgment, recorded an order that a witness to whom a pardon had been tendered under section 347 should be prosecuted, the pardon being withdrawn on the ground that the conditions upon which it had been tendered had not been complied with, and the witness was prosecuted and convicted, the conviction was illegal. *Per MACLEAN, J.*—Where an order is made by a Court of

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Session under section 349 of Act X. of 1872 withdrawing a pardon; it is sufficient, for the validity of such order, that it appeared to the Court of Session, before judgment was passed, that the witness had not conformed to the conditions of the pardon, notwithstanding that the order be made at the end of the judgment in the case.—*Per MACLEAN, J.*—Where a trial has been improperly originated, the High Court has power to set aside a conviction on such trial.—*NOLIN CHUNDER BANIKYA v. EMPRESS* ... Vol. X. 369.

(Act X. of 1872).

section 359—*Refusal to summon witnesses*—*Evidence*—In a prosecution, the case on both sides having been closed, the Magistrate issued a summons to a witness to give evidence, whereupon the accused filed a petition, praying to have certain witnesses summoned to give evidence to rebut that of the witness called by the Magistrate. The petition was refused.—*Held* that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused except on the grounds specified in section 359 of the Code of Criminal Procedure; and that the fact, that the accused had, at the close of his case, stated that he did not wish to call the witnesses whom he now tendered, was no reason for refusing to summon them to meet fresh evidence taken by the Magistrate.—*IN THE MATTER OF DEELA MANTON* ... Vol. VIII. 70.

(Act X. of 1872).

sections 418 and 419—see *Stolen property* ... Vol. 339.

(Act X. of 1872).

section 446—*Procedure*—*Charge framed by committing Magistrate*—*Irregularity*—Where an accused person is committed to take his trial on specific charges before the Sessions Court, the Judge has no power under section 446 of Act X. of 1872 to expunge a charge before calling upon the accused to plead to it.—*EMPRESS v. PORESHOLLA SHEIK* ... Vol. VII. 143.

(Act X. of 1872).

section 448—see *conviction for graver offence on appeal*. Vol. VI. 427.

(Act X. of 1872).

section 455—*Penal Code, sections 411 and 413*—*Offences of same kind*—The offence of receiving or retaining stolen property, punishable under section 411, and of habitually receiving or dealing in such property, punishable under section 413 of the Indian Penal Code, are not offences of the same kind within the meaning of section 453 of the Criminal Procedure Code.—*UTTOM KOONDOL v. THE EMPRESS* ... Vol. X. 466.

Criminal Procedure Code (Act X. of 1872), section 453—Charge—Offences of same kind—Practice.—The accused was charged under the same charge with house-breaking by night with intent to commit a theft in the house of A, and also with the same offence in the house of B, and upon his own plea was found guilty. *Held* that the accused was properly charged, as the words of section 453 of Act X. of 1872 did not limit the offences for which an accused person might be charged and tried at one trial to offences against the same person, and the meaning of the section was not restricted by the Explanation thereto.—IN THE MATTER OF MANU MRYA ... Vol. XI. 522

—(Act X. of 1872),
• • section 453—see Penal Code, (Act XLV. of 1860) sections 1167 and 466
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—(Act X. of 1872),
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—(Act X. of 1872),
section 454—Cumulative sentences—Penal Code (Act XLV. of 1860), sections 147 and 324—Separate charges.—Under section 454 of the Code of Criminal Procedure, the collective punishment which may be awarded for offences under sections 147 and 324 of the Indian Penal Code must not exceed that which may be given for the graver offence. *Quare.*—Whether separate convictions under sections 147 and 324 of the Indian Penal Code are legal?—JABBAR KAZI AND GOLAP KHAN ... Vol. VIII. 350

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—(Act X. of 1872),
section 457—Penal Code (Act XLV. of 1860), sections 149 and 325—Charge, Alternate or separate—jury, Verdict of—Sentence on appeal from acquittal, Commencement of—Acquittal; Reversal of sentence of—Under section 457 of the Code of Criminal Procedure (Act X. of 1872), it is competent to a jury to return a verdict of guilty of an offence under section 325 only of the Penal Code, although that offence did not form the subject of a separate charge, but was entered as a charge coupled with an offence under section 149 of the Penal Code. Where the jury is unanimous, their verdict must be received unless it be contrary to law; the Court is not competent in such a case to direct it to reconsider its verdict. Where, on the appeal of Government, an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to jail, and not from the date of their arrest or of the sen-

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tence on the appeal.—*EMPERESS v. MAHUDDI* ... Vol. VI. 349

—(Act X. of 1872),
section 458—Procedure—Evidence of one prisoner against another tried jointly.—Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other.—IN THE MATTER OF A. DAVID ... Vol. V. 574

—(Act X. of 1872),
section 468—Penal Code (Act XLV. of 1860), sections 191 and 193—Jurisdiction of Court—Sanction to prosecute—Oaths voluntarily taken—A mortgagee presented a petition in the District Court of R., under Regulation XVII. of 1866, for foreclosure of a mortgage of certain land, which, at the time of the execution of the mortgage, was situate in the district of R., but which had since been transferred to the district of Pubna. In reply it was alleged that the mortgage had been paid off, and a receipt by the petitioner was put in. The matter was, however, compromised, no evidence having been given on either side. It appeared that the petition for foreclosure was verified by the affirmation of the petitioner, although it was not necessary that it should have been so verified, and the mortgagors applied to the District Court of Pubna, within the jurisdiction of which the land now was, for leave, under section 468 of the Criminal Procedure Code, to prosecute the mortgagee under section 193 of the Indian Penal Code for giving false evidence in regard to the receipt, and such leave was granted. *Held* that the sanction given by the Judge of Pubna was illegal on the ground that the District Court at Pubna had no jurisdiction. *Sembl.*—That, although a superior Court has no right to question the sanction under section 468 of the Criminal Procedure Code given by the Court which heard the evidence, yet, where the sanction is given by the Court before any evidence in the case has been taken, and without materials before it upon which it could properly exercise a discretion, such a sanction can be set aside. *Barkutullah Khan v. Rennie*, 1 L. R., 1 All. (F. B.) 17; *Ram Pershad Hasaree v. Soomutha Dabee*, 5 W. R., Misc. (F. B.), 21. *Quare.*—Whether a statement on oath voluntarily taken in a proceeding where an oath is not necessary comes within section 191 of the Penal Code.—KAZI GHUNDRA MOZOOMDAR v. JOGGUT GHUNDRA MOZOOMDAR ... Vol. VII. 380

—(Act X. of 1872),
section 468—Penal Code (Act XLV. of 1860)
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1860), section 211—*Sanction to prosecute.*—A local investigation, upon information given by A that a dacoity had been committed having been made under section 115 of the Criminal Procedure Code, the District Magistrate, upon the report of the inquiry made in the local investigation without giving A an opportunity of having a judicial inquiry into the charge preferred by him, passed the following order: 'B (one of the persons alleged by A to have committed the offense) is directed to bring a case under section 211 of the Penal Code,' and he directed the Superintendent of Police to take charge of the prosecution.—*Held* that the order quoted could not be considered a sanction under section 468 of the Criminal Procedure Code, and that, if it were intended to be such, it was expressed in an improper manner. *Held*, also, that the direction that the Superintendent of Police should take charge of the prosecution was given without jurisdiction and was calculated to prejudice the person against whom the prosecution was directed.—*Held*, further, that the proceedings in the original charge not having been before a Court, no sanction under section 468 was requisite.—IN THE MATTER OF GIRIDHARI MONDUL ... Vol. X. 46

—(Act X. of 1872),
section 468—see sanction to prosecute ... Vol. X. 4

—(Act X. of 1872),
section 471—*Cases exclusively triable by Sessions Court—Indian Penal Code, section 193.*—It is only in cases exclusively triable by a Court of Session, that such Court has power to commit, or hold to bail and try an accused person charged with the offences mentioned in sections 467, 468, and 469 of the Code of Criminal Procedure. The words "commit the case itself," occurring in section 471, do not empower a Court of Session to commit to itself a person charged with giving false evidence before it, under section 193 of the Indian Penal Code.—IN RE FATA IYAH KHAN... Vol. III. 500

—(Act X. of 1872),
section 471—see False charge, Vol. II. 35

—(Act X. of 1872),
section 489—see Recognizance Vol. VIII. 72

—(Act X. of 1872),
sections 491 and 500—Where a Magistrate bound down 26 persons to keep the peace under section 491 of the Criminal Procedure Code after recording evidence as to 11 of them only, the order was set aside

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as to the persons not affected by the evidence.—IN THE MATTER OF KASSIM BISWAS ... Vol. X. 335

—(Act X. of 1872),
section 491—see Security to keep the peace ... Vol. III. 72

—(Act X. of 1872),
section 491—*Summons to appear—Non-resident zemindar—Bond to keep the peace.*—A summons setting out that the person to whom it is directed is charged with an offence under section 491 of the Criminal Procedure Code, and requiring his personal appearance in Court, is not such a summons as is required by that section. A non-resident zemindar cannot be bound over to keep the peace because his local agents are committing acts likely to cause a breach of the peace.—IN THE MATTER OF CHAROO CHUNDRA MULLICK ... Vol. X. 430

—(Act X. of 1872),
section 491—*Breach of peace—Adjournment of Proceedings, effect of—Discharge.*—An order postponing proceedings instituted under section 491 of the Code of Criminal Procedure (Act X. of 1872) until the person called upon to show cause shall have established in a Civil Court the title claimed by him to the property disputed with reference to which there is a likelihood of a breach of the peace, amounts to a discharge.—EMPRESS & DHUNTRAM ... Vol. V. 366

—(Act X. of 1872),
sections 491, 494—*Evidence taken before party concerned—section 530—Proceeding necessary.*—A proceeding under section 530, Code of Criminal Procedure, must be recorded by the Magistrate stating the grounds of his being satisfied of the existence of a dispute regarding land, &c., likely to induce a breach of the peace before he can order a person to be retained in possession thereof. A Magistrate cannot bind over a person to keep the peace unless he has adjudicated on evidence taken in the presence of that person that a breach of the peace is probable. If such person fails to attend on a summons duly served, a warrant should issue (section 494); the order for security cannot be passed *ex parte*.—IN THE MATTER OF OXHIL CHUNDER BISWAS ... Vol. I. 48

—(Act X. of 1872),
section 491—see Security to keep the peace ... Vol. III. 280

—(Act X. of 1872),
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—(Act X. of 1872),
section 502—see Forfeiture of Recognizance ... Vol. II. 408

Criminal Procedure Code (Act X. of 1872), sections 505, 510—Bad livelihood

—Security for good behaviour—Sureties—

Cash Deposit—Seven persons were charged, under section 505 of the Code of Criminal Procedure, with being persons of notoriously bad livelihood. Two only were proved to have been ever convicted of any substantive offence, and the convictions proved against them took place 30 and 32 years before, but it appeared that they had in 1867, been imprisoned for three years as budmashes in default of finding security. The Magistrate, under section 510 of the Criminal Procedure Code, ordered each of the seven accused to find two sureties to the amount of Rs. 500, three of them to deposit in cash Rs. 100 each, two of them Rs. 500, and the remaining two Rs. 250, and in default to have rigorous imprisonment for one year. The High Court held that it was illegal to require the accused to deposit cash instead of giving bonds as security for good behaviour, and that the order of the Magistrate as to sureties was prohibitive. It accordingly quashed the orders requiring the deposits of cash and the finding of sureties, and directed that six of them (it being found that as to the seventh the Magistrate acted entirely without jurisdiction) should enter into bonds for their good behaviour in the amounts which they were directed to deposit in cash. The sections of the Procedure Code relating to budmashes should be exercised with extreme discretion.—**EMPRESS v. KALI CHAND DASS** ... Vol. VI. 428

—(Act X. of 1872),
section 505—see **Bad livelihood**
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—(Act X. of 1872),
section 505—Bad livelihood—charge—
Notice of precise matter proved—Witnesses
—**Bail**—A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion. He should be asked to produce his witnesses, or offered assistance to procure their attendance. He should be admitted to bail.—A Magistrate is not competent to refuse bail unless the law sanctions such refusal.—**IN THE MATTER OF KOOKING SINGH** ... Vol. I. 130

—(Act X. of 1872),
section 509—Security for good behaviour
—**Mode of fixing the amount**—The amount of the security to be furnished for good behaviour should be such as to afford the person a fair chance of complying with the order, so as not to make the alternative imprisonment unavoidable. Such imprison-

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ment is now as a punishment for a crime committed, but as a protection to society against the preparation of a crime by the individual on his failing to furnish other security. When the amount of security required is *prima facie* unreasonable, the High Court can call upon the Magistrate to certify the grounds for fixing that amount.—**IN THE MATTER OF DEDAR BAKSH AND HALAL CHOR** ... Vol. I. 95

—(Act X. of 1872),
section 518—Revival of order after proceedings being struck off—An order having been made under section 518 of the Criminal Procedure Code, Act X. of 1872, was subsequently reviewed by the Magistrate who passed it. On the review the Magistrate struck off the case, remarking that the order was bad, and referred the matter to his superior officer. The latter having declined to interfere, stating that he was nothing illegal in the order, the Magistrate, by an order, revived his former order. **Held** that there being no fresh proceeding, the order reviving the other was bad.—**J. BRADLEY v. C. E. JAMESON**. Vol. XI. 414

—(Act X. of 1872),
section 518—Haut, Removal of, to a distance—Jurisdiction—Where a Magistrate made an order under section 518 of the Code of Criminal Procedure (Act X. of 1872), directing one of two rival haut proprietors to remove his haut to such a distance as to render it useless for the purposes for which it was established, it was held that the order came within the purview of the Full Bench decision of **Gopi Mohun Moullick vs Taramoni Chowdhurani**, 4 C. L. R. 309, and might be set aside as in excess of jurisdiction.—**SHURUT CHUNDER BANERJEE v. BAMA CHURN MOOKERJEE** ... Vol. IV. 410

—(Act X. of 1872),
sections 518, 520—Court of Revision—Judicial Proceedings—The existence of the circumstances mentioned in explanation 1, is a condition precedent to the action of a Magistrate under section 518, Code of Criminal Procedure. If the matter is one which cannot properly be dealt with under section 518, it does not fall within that section, and being a judicial proceeding is not protected by section 520 from the action of a Court of Revision under section 297.—**IN THE MATTER OF KRISHNA MOHUN BYSACK** ... Vol. I. 58

—(Act X. of 1872),
section 521—see **Order to open road** ... Vol. II. 509

—(Act X. of 1872),
sections 521 and 526—Fury—Disobedience to order of Court—Penal Code (Act

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XLV. of 1860, section 188—A jury having been applied for and duly appointed under section 521 of Act X. of 1872, one of the jurors appointed by the Magistrate fell sick, and the foreman of the jury, unknown to the Court, substituted another man in his place. The Magistrate accepted the report of the Majority of the jury so constituted, and made an order under section 526. This order having been disobeyed, proceedings were taken under section 188 of the Penal Code against the person to whom it was directed, and he was convicted and sentenced to imprisonment. *Held* that the report upon which action was taken not being the report of a regularly constituted jury, the order and the conviction and sentence passed on disobedience thereto were illegal.—*EMPRESS v. BHOIRUB CHUNDER DATTA* ... Vol. X. 193

—(Act X. of 1872),
section 521—see Withdrawal of
order ... Vol. I. 486

—(Act X. of 1872),
section 521—*Court of Revision—Procedure*—Where a Magistrate considers that there is no sufficient reason for proceeding under section 521 of the Code of Criminal Procedure, he may let the matter drop, and the High Court will not, as a Court of Revision, interfere with his action. *In the Matter of Sonai Paramanick*, 1 C. L. R. 486, followed.—*ISSUR CHUNDER NATH v. KALI CHURN NATH* ... Vol. XI. 235

—(Act X. of 1872),
section 521—*Procedure—Obstruction—Thoroughfare*—The fact of a Magistrate taking action under section 521 of the Code of Criminal Procedure is *prima facie* sufficient to show that he considers the *locus in quo* to be a thoroughfare or public place; and if no objection is taken that it is not such, and the jury find that the order made under that section is reasonable and proper, the High Court will not interfere.—*IN THE MATTER OF IMANDI KHAN* ... Vol. VIII. 399

—(Act X. of 1872),
sections 521 and 525—(*Evidence—Procedure*—Where a person, to whom an order has been issued under section 521 of the Code of Criminal Procedure, appears to show cause against such order, the Magistrate is bound to take evidence under section 525 of the Code.—*IN THE MATTER OF MOHUR MANDAR* ... Vol. VIII. 431

—(Act X. of 1872),
sections 521, 523 and 532—*Obstruction to thoroughfare or public place—Jury, Duty of, under section 523 of the Criminal Procedure Code—Jury, Removal of—In*

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order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction under section 521 of the Code of Criminal Procedure, the place obstructed must be a thoroughfare or public place; and where this is disputed by the person on whom notice to remove the obstruction has been served, the decision of the question cannot be referred, under section 523, to a jury. A Magistrate ought not, at the instance of one party, and behind the back of the other, to cancel the appointment of a juror, even if such juror be his own nominee.—*CHUNDER NATH SEN v. RAM DVAL GHUTTUCK* ... Vol. VI. 379

—(Act X. of 1872),
section 530—*Possession—Dispute as to a number of plots of land—Procedure—Practice*—A dispute, having arisen as to the possession of 109 plots of land, to which a claim to possession was made by the ryots of village A on the one hand, and by the ryots of village B on the other, the Magistrate instituted a proceeding under section 530 of the Criminal Procedure Code in respect of all the 109 plots, but, having taken evidence, dealt in his order with 12 only, directing that the ryots of village B should be kept in possession. *Held*, that, it appearing that all the 109 plots were covered by the same state of circumstances, the Magistrate had exercised a sound discretion in acting as he did.—*AZIM MOLLAH v. SATOO PORAMANICK* ... Vol. X. 523

—(Act X. of 1872),
section 530—*Preliminary proceeding before Magistrate—Dispute likely to give rise to breach of peace—Jurisdiction*—It is not sufficient to give a Magistrate jurisdiction under section 530 of the Code of Criminal Procedure for him to record in his final judgment an opinion or proceeding that it is probable that a breach of the peace will occur if proceedings under that section be not taken.—*DAMODUR BENDYADUR v. SHYAMANUND DEY* ... Vol. VIII. 514

—(Act X. of 1872),
section 530—see Notice. Vol. III 551

—(Act X. of 1872),
section 530—*Proceeding to be recorded under section 530 of Act X. of 1872—Police report, Incorporation of, in proceeding recorded by Magistrate—Possession—Title, how far evidence of possession—Where action was taken under section 530 of the Criminal Procedure Code, the Magistrate recorded the following statement—"whereas, from the police-report, a breach of the peace is probable"—as the ground of his proceeding under that section—*Held* that the proceeding thus recorded by the Magistrate was not in itself a sufficient compliance*

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with the requirements of the section, which requires that the proceeding shall state that the Magistrate is satisfied that a dispute likely to induce a breach of the peace existed, and the ground upon which he is so satisfied, but that the police report referred to might be incorporated to show that a dispute likely to induce a breach of the peace existed, and that there were grounds upon which the Magistrate might reasonably be satisfied—Where there has been substantial evidence of possession or a conflict of evidence on that question, the Magistrate is justified in looking to the evidence of title in corroboration of the evidence of possession.—*IN THE MATTER OF KALI KRISHNA THAKUR v. GOLAM ALI CHOWDHURY*. ... Vol. VIII. 245

—(Act X. of 1872),
section 530—Jurisdiction of Magistrate—Magistrate's duty to maintain decree or order of competent Court—Land Registration Act, Order under, as to possession—"Dispute"—Breach of peace—Act X. of 1872, section 491—The principal that, where there has been a decree passed between rival claimants to immoveable property, it is the duty of the Magistrate to maintain such decree, is applicable to order in proceedings under the Land Registration Act declaring a particular person in possession. Accordingly, where an order had been made under that Act, in the presence of both parties, and after evidence taken on both sides, declaring one of the parties to have proved possession, and entitled to have his name registered, and pending the confirmation of that order, disputes arose as to the land in question, it was held, on the ground that, when the rights of the parties had been determined by a competent Court, there was no longer a "dispute" within the meaning of section 530 of the Code of Criminal Procedure, that it was not competent to the Magistrate to take proceedings under that section. The proper course for a Magistrate to pursue if the unsuccessful party takes any act that may probably occasion a breach of the peace, is to take action under section 491 of the Code of Criminal Procedure.—*GOBIND CHUNDER MOITRA v. ABDUL SAYAD AND OTHERS*. ... Vol. VIII. 217

—(Act X. of 1872),
section 530—Possession, symbolical under decree of Civil Court, Effect of—Jurisdiction—A certain mouzah having been sold in execution of a decree obtained upon a mortgage, the purchaser claimed a right under the sale to a haut appurtenant to the mouzah, and was put by the Nazir of the Civil Court into symbolical possession of

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the haut, as well as of the mouzah. The judgment debtor refused to give up actual possession of the haut, maintaining that it was debutter property of which he was the shebait. A breach of the peace being imminent in consequence of the rival claims, proceedings were taken under section 530 of the Criminal Procedure Code, and the Magistrate, finding that the judgment-debtor was in actual possession of the haut, made an order maintaining him in such possession until ousted by a Civil Court. Held (setting aside that order) that the Magistrate had no power under section 530 of the Criminal Procedure Code, to direct the judgment-debtor to be retained in possession until ousted by Civil Court, but was bound to see that the possession, as given by the Nazir, was maintained, leaving it to the debtor to substantiate his claim as shebait in a Civil Court. The Court accordingly directed that the purchaser be restored to possession, and that the Magistrate do see that he is kept in possession until ousted by due course of law.—*IN THE MATTER OF CHUTRAPUT SINGH*. Vol. V. 200

—(Act X. of 1872),
section 550—Possession under decree of Civil Court—Magistrate, duty of, as to enforcement of decree of Civil Court—Jurisdiction of Magistrate—Where a decree has been passed by a Civil Court determining the rights of the parties to a suit to disputed land, it is a Magistrate's duty to uphold that decree, and he can not as between such parties, proceed under section 530 of the Code of Criminal Procedure to decide afresh upon the question of possession. *Roy Mohan Roy v. Wise*, 16 V. R. 24, and *Raneengunge Coal Association v. Hem Lal Ghatwal*, 24 W. R. 17, followed.—*BHOLANATH GHOSH v. MOTHOOOR MUNDLE*. ... Vol. VII. 516

—(Act X. of 1872),
section 530—see death of a party
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—(Act X. of 1872),
sections 530 and 550—Breach of the peace, Probability of—Enquiry—There being no present danger of a breach of the peace, the fact, that such a breach is likely to take place at a future time, will not justify a Magistrate in making an order under section 530 of the Criminal Procedure Code. The duty of making an inquiry under section 533 of the Criminal Procedure Code should be deputed to a Magistrate, not a canungo.—*UMA CHURN SANTRA v. BENI MADHUB ROY*. ... Vol. VII. 352

—(Act X. of 1872),
section 530—Order under section 530 of Act X. of 1872, to whom addressed—Penal

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Code (Act XLV. of 1860), section 188, Conviction under—Practice—In the absence of evidence that an order under section 530 of the Criminal Procedure Code was in fact directed to the accused, he cannot legally be convicted under section 188 of the Indian Penal Code for disobeying such order. *Quære*—Whether an order under section 530 can be directed to others than the unsuccessful party to the proceedings under the section; or whether such an order could properly be directed to the public at large.—IN THE MATTER OF NOBO KISHORE CHUCKERBUTTY ... Vol. VII. 291

(Act X. of 1872),

section 530—Decree, Resistance to execution of—Possession—Civil Procedure Code (Act X. of 1877), Chapter XIX.—A Criminal Court ought not to interfere in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought, the procedure to be adopted in such cases being that provided in Chapter XIX. of the Civil Procedure Code.—PRAYAG SINGH v. FUZOOL HOSSEIN ... Vol. VI. 206

(Act X. of 1872),

section 530—Parties—Where there is a dispute likely to lead to a breach of the peace concerning land, and proceedings are recorded and had under section 530 of the Criminal Procedure Code, no order should be made against one who is acting as the servant of another person who claims to have possession of the land, unless, that other person, is made a party to the proceedings.—IN THE MATTER OF JITBAHAN v. BANSRUP DHOBI ... Vol. VI. 193

(Act X. of 1872),

sections 359 and 530—see, Illegal Assembly ... Vol. II. 62

(Act X. of 1872),

section 530—Order of Magistrate—Limited possession—A Magistrate cannot under section 530, Code of Criminal Procedure, order that a person be kept in possession until he has reaped the crop standing on the ground, and then that he shall give way to another. When there have been long pending disputes in the Courts, he should determine who was in peaceable possession when they commenced.—IN THE MATTER OF BUNWARI LALL MISSEER AND OTHERS ... Vol. I. 136

(Act X. of 1872),

section 530—Proceeding based upon insufficient materials—Jurisdiction—Where the proceeding recorded by a Magistrate, under section 530 of the Criminal Procedure Code, is based on materials which do not disclose sufficient ground for consider-

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ing that a breach of the peace is imminent, an order calling upon the parties concerned in the dispute to attend in Court, and give in a written statement of their respective claims, in respect of the fact of actual possession of the subject of dispute, may be set aside as made without jurisdiction.—CHUNDER MADHUB GHOSH v. JUGGUT CHUNDER SEN ... Vol. IV. 483

(Act X. of 1872),

section 530 and 533—see Possession ... Vol. III. 134

(Act X. of 1872),

section 530—Constructive Possession—Possession through ticcadars—Section 530 of the Code of Criminal Procedure contemplates disputes between owners as well as occupiers. *Per JACKSON, J.*—Where a zemindar has let his lands in farm, he, his farmers, and the occupying ryots, are all, in their degree concerned in any dispute as to possession which may arise, and they ought to be maintained in possession of the interests which they severally enjoy. *Sutherland v. Cowdy*, 18 W. R. 11, cited. *Empress v. Thakoor Doyal Singh*, 1 L. R. 3 Cal. 330, commented upon as having gone too far.—HARAK NARAIN SINGH v. LUCHMI BUX ROY ... Vol. V. 287

(Act X. of 1872),

sections 530 and 531—see Actual Possession ... Vol. III. 94

(Act X. of 1872),

section 531—Doubtful possession—section 530—Interpretation of decree of Civil Court—The doubt upon which a Magistrate can act under section 531, Code of Criminal Procedure, must arise from his inability to decide on evidence offered by the contending parties as to their possession, and not on a doubt entertained without such inquiry. A Magistrate, acting under section 530, cannot interpret the meaning of a decree of a Civil Court. He can determine only the fact of actual possession.—IN THE MATTER OF RAJA LEEBANUND SINGH, BAHADOOR ... Vol. I. 273

(Act X. of 1872),

section 531—Possession—Attachment—Order of Magistrate—It is only when, after recording a proceeding under section 530, Code of Criminal Procedure, and taking evidence, a Magistrate decides, that neither party is in possession or is unable to satisfy himself as to which party is in possession, that he can, under section 531, attach land in dispute. He is not competent summarily to order attachment without such preliminary proceedings.—IN THE MATTER OF RAM SOONDAREE DEBEE ... Vol. I. 86

Criminal Procedure Code (Act X. of 1872), section 532—Dispute, Nature of—Jurisdiction of Magistrate—Declaratory Decree—To enable a Magistrate to interfere in any matter under section 532 of the Code of Criminal Procedure (Act X. of 1872), there must be some substantial dispute in some way necessitating such interference. That section only enables the Magistrate to prevent arbitrary interruption, by any person, of rights actually enjoyed by the public or a person or class of persons; it does not enable him to make a purely declaratory decree—*M. H. RAJA OF BURDWAN v. THE CHAIRMAN OF THE DARGEEING MUNICIPALITY* ... Vol. IV. 324

—(Act X. of 1872),
section 536—Maintenance of child—Re-opening of case decided—When a duly-empowered Magistrate has decided a matter under section 536 of the Criminal Procedure, by dismissing the application after hearing the evidence offered, the District Magistrate is not competent to entertain the complaint *de novo*—*THE MATTER OF MUSSUMAT JAMOTI* ... Vol. I. 89

—(Act X. of 1872),
section 536—Moota marriage under Shia Law—Maintenance of Shia wife by Moota marriage—Although a Shia wife by moota marriage is not entitled by the Shia Law to maintenance, such a wife is entitled to maintenance under the provisions of section 536 of the Criminal Procedure Code, Act X. of 1872. Where a Shia husband gives up the unexpired portion of the term fixed by a moota marriage, he does not thereby terminate the relationship of husband and wife—*LUNDUN SARRBA v. MIRZA KAMAR KUDAR* ... Vol. XI. 237

Criminal Proceedings, Institution of—see Penal Code, section 211 ... Vol. VIII. 233

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Cross Criminal Cases, Procedure in—see Procedure in cross cases Vol. XIII. 275

Cross-examination, Refusal of right of—Criminal Procedure Code (Act X. of 1872), sections 186 and 249—A, B, and C having been charged with murder before a Magistrate, two vakeels presented their vakalatnamas, and applied to be allowed to conduct the defence of the accused. The Magistrate refused permission, and after recording the depositions of the witnesses committed the accused to take their trial before the Session Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses,

Cross-Examination (contd.)

who, on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. Two of them denied having made the statements recorded, while the third admitted the statements attributed to him, but asserted they were false and made under pressure. The Sessions Judge, disbelieving the statements made in his Court, thereupon under section 249 of the Code of Criminal Procedure (as amended by section 20 of the Amending Act) used the previous depositions as evidence in the case, and mainly upon these convicted the accused of murder and sentenced them to transportation for life. Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions. The High Court affirmed the conviction and sentence—*IN THE MATTER OF DHAM MUNDUL AND OTHERS* ... Vol. VI. 53

—**of witnesses called by the Court—**The Court ought not to refuse to allow the cross-examination of a witness called by it—*IN THE MATTER OF GRISH CHUNDER TALOOKDAR* ... Vol. V. 364

—**Depositions before the Magistrate—Discrepancies—**In a trial before a Sessions Court, the attention of the jury may be called to discrepancies between the evidence given by witnesses in such Court and that given before the committing Magistrate without the depositions before the Magistrate being put in—*EMPERSS v. HARAN CHUNDER MITTER* ... Vol. VI. 390

—**by Court—Criminal Procedure Code (Act X. of 1872), section 250—**It is improper for the Court to cross-examine a prisoner with the apparent object of convicting him out of his own mouth of false statements, and so making him prejudice, himself in respect of the matter with which he is charged—*EMPERSS v. BHARI LALL ROSE* ... Vol. VI. 431

—**of witnesses by Court—Evidence Act (I. of 1872), sections 138 and 165—Per surium—**It was not intended that, under section 165 of the Evidence Act, a judge should have power to cross-examine the witnesses for the prosecution; and as a general rule witnesses should be left by the Court to the pleaders to be dealt with as laid down in section 138 of the Act, it not being

Cross-Examination (contd.)—

the province of the Court to examine witnesses unless the pleaders on either side have omitted to put some material question or questions.—IN THE MATTER OF NOOR BUX KAZI, SHAIKH TOYAB, and JAMIR MUNDLE Vol. VII. 385

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Evidence Act (I. of 1872), sections 5, 6, 8, 11, 14—*Evidence, on criminal trial, of unconnected acts of same nature as those charged*—In a trial upon three specific charges of receiving illegal gratification from the firm of C. and Co., at T, in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Theyetmyo in the years 1877 and 1878 was offered: *Held* that such evidence was inadmissible. *Per MITTER, J.*—If the receipt of the several sums mentioned in the charges be considered to have been proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 might be relevant under section 14 of the Evidence Act; but they are not relevant for the purpose of establishing the fact of payment in 1876.—*EMPRESS v. M. J. VYAPOORI MOODILIAR*
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—**sections 21, 25, and 26**—*Admission made by accused to police-officer before arrest*.—An admission, not being a confession of guilt, made by an accused person to a police-officer before arrest, is admissible in evidence.—*EMPRESS v. DABER PERSHAD* Vol. VII. 541

—**section 25**—*Confession to a police-officer*.—Under section 25 of the Indian Evidence Act (I. of 1872), a confession made to a police officer is inadmissible in evidence, except so far as is provided by section 27. It is immaterial whether such police-officer be the officer investigating the case—the fact that such person is a police-officer invalidates a confession.—*IN THE MATTER OF HIRAN MIYA alias ABDUL WAHID* ... Vol. I. 21

—**section 32**—*Statements by deceased as to cause of death*.—Where the accused was charged with culpable homicide not amounting to murder, the question was, whether the deceased had died from the effects of a beating. *Held* that a statement by the deceased, that he had been beaten by the accused, was admissible in evidence under section 32 of the Evidence Act, without proof that, at the time of making the statement, the deceased was conscious of

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any fatal effect of such beating.—*EMPRESS v. BLECHYNDEN* ... Vol. VI. 271

—**sections 31 and 38**—*Deposition of deceased witnesses*.—*"Issue substantially the same"*.—The deposition of the complainant upon a charge of grievous hurt having been taken before the Magistrate, the complainant died. In consequence of his death charges of murder and culpable homicide not amounting to murder were added before the Sessions Judge. *Held* that the deposition of the complainant before the Magistrate was admissible in evidence before the Sessions Court under section 33 of the Evidence Act. *Per curiam*.—By "the questions in issue" referred to in section 33 of the Evidence Act being required to be "substantially the same," it is not intended that in a case where the person injured dies subsequently to the inquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because, in consequence of his death, other charges are framed against the accused.

The matter depends upon whether the same evidence is applicable, although different consequences may follow from the same act.—*ROHLIA MAHTO v. EMPRESS*
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—**section 33**—*"Incapable of giving evidence"*.—*Discretion of Court*.—The words "incapable of giving evidence" in section 33 of the Evidence Act, I. of 1872, denote an incapacity of a permanent, not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion "if his presence cannot be obtained without an amount of delay or expense which, under the circumstances the Court considers unreasonable."—*IN THE MATTER OF PYARI LALL* ... Vol. IV. 504

—**section 33**—*Witness "incapable of giving evidence"*.—*Deposition of*.—To bring a case within section 33 of the Evidence Act, in order to admit a deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house, but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend. *Per PONTIFEX and FIELD, JJ.*—The incapacity to give evidence contemplated by section 33 of the Evidence Act, in our opinion, is not necessarily a permanent incapacity. *In the Matter of Pyari Lall*, 4 C. L. R. 504,

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Official Public Book—Evidence of entry in Official Public Book—Entry in Official Public Book, Evidence of non existence of—Indian Penal Code (Act XLV. of 1860), sections 192 and 466—Fabrication of false evidence—Forgery—Section 35 of the Evidence Act, which provides "that any entry in an official public book, which is duly made by a public servant in the execution of his duty, is of itself a relevant fact," does not make the public book evidence to show that a particular entry has not been made in it. Section 466 of the Indian Penal Code is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer. The accused, in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate, and as to what estates the rents were in arrear, so that he might take steps to enforce payment, and was convicted by the Sessions Judge of an offence under section 465 of the Indian Penal Code. Held, on appeal, that the accused ought properly to have been convicted under section 192 of the Code; the provisions of that section not being confined to false evidence to be used in judicial proceedings.—IN THE MATTER OF JUGGUN LALL ... Vol. VII. 356

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Statement made in absence of accused—Confession—In a case of riot which resulted in the death of one person and serious injury to others from gun-shot wounds, the persons implicated were tried together before the Sessions Judge, who adopted the following procedure: He examined the prisoners one by one, requiring the others to withdraw from the Court until their respective turn for examination came round, and, principally upon statements thus obtained in their absence, he convicted all the prisoners. Held that the Sessions Judge had, in adopting such procedure, acted in a manner directly opposed to the rule that no one should be condemned upon statements made in his absence, and therefore that all statements thus made by any of the prisoners in the absence of another must be put out of consideration so far as

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followed. A necessity for altering a con-
viction from one section to another for
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sufficient ground for a reference to the
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Agent.—At the request of certain licensed
excise dealers in Agra, to whom liquor was
consigned from Europe, A. in Calcutta,
paid the duty and landing charges, and
was in the act of forwarding the liquor to
Agra, when the liquor was seized in his
possession, and a charge laid against him
of being in the possession of exciseable
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A was convicted. *Held* that the conviction
was bad. *IN THE MATTER OF HENRY KYR*
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of, as to excise—Section 61 of Act VII.
(B. C.) of 1878 must be construed strictly.
Accordingly the words "the quantities
specified in section 15" in that section
must be taken to contemplate the quantities
actually mentioned in section 15, and not
such quantities, whether greater or smaller,
as the Board of Revenue might, under any
authority in it, specially fix upon. *Quare*
—Whether the Board of Revenue has
power specially to direct that any excise-
able article may be sold in greater or less
quantity by wholesale or retail than is
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False charge—*Preliminary inquiry*—
Section 211, Indian Penal Code—*Section 471,*
Code of Criminal Procedure—A petition
was presented to the Joint Magistrate charg-
ing the police with having made a false
report of an investigation which they had
been directed to make at the instance of the
petitioner. The Joint Magistrate, after
reading the police report, rejected the peti-
tion, and directed the petitioner to be pro-
secuted under section 211 of the Indian
Penal Code for having made a false charge.
Held that the Joint Magistrate should not
have made the order without first instituting
an inquiry into the truth of the complaint,
such as is required by section 471 of the
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Forged document—*Penal Code (Act XLV. of 1860), section 471*—*Jury, Charge to—Misdirection*.—Where the accused were charged, under section 471 of the Penal Code, with having, in a suit brought against them by the vendee of their sister to recover possession of certain property acquired by her by right of inheritance from her father, fraudulently and dishonestly used a forged document as genuine, knowing or having reason to believe it to be a forged document, it appeared that the accused were in possession of the property, and that the

Forged document.—(contd.)—

document in question purported to be a deed of gift from their father. It was proved that the endorsement of registration which appeared in the document was a forgery. In his charge to the Jury, the Sessions Judge omitted to deal with the fact of the accused being in possession of the property. He also directed that the registration-endorsement having been proved to be a forgery, it was for the accused persons to establish the genuineness of the document. Held that it was not sufficient for the Jury merely to decide on the evidence whether the document was a forgery, and whether the accused knew it was a forgery when they used it, but it was further necessary for the Jury to decide whether the document had been used fraudulently and dishonestly. Held, also, that the Sessions Judge, in omitting to deal with the fact of the possession of the accused, and in throwing the onus of proving the genuineness of the document upon them, had misdirected the Jury.—KHORSHID KAZI. v. EMPRESS ... Vol. VIII. 542

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Magistrate, Disqualifying interest of (contd.)—

in a competent Court in a prosecution under section 77, the *onus* being on the prosecutor. *Held*, further, that the proceedings and conviction were illegal on the ground that, by his connection as servant with the Corporation, B had such an interest, pecuniary or personal, as was likely to give him a bias in the matter of the prosecution.—J. WOOD v. THE CORPORATION OF THE TOWN OF CALCUTTA Vol. IX. 693

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Murder—Culpable homicide—Presumption from probable consequences of an act—The appellant, having armed himself with a sword, struck in the dark at certain persons in a house, causing wounds which resulted in the death of one person. Held: *per JACKSON, J.*—That such conduct raises an inference that he intended to cause death. *Per AINSIE, J.*—That though he probably did not see how his blows were directed, as he struck them with a deadly weapon regardless of consequences, he must have known that his act was so imminently dangerous that it must, in all probability, cause such bodily injury as was likely to cause death. *Per CUNNINGHAM, J.*—That the offence was culpable homicide, and not murder, being an unpremeditated act of reckless violence rather than an act done with the knowledge or intention which is essential to constitute murder.—**BEJADHUR ROY** ... Vol. II. 211

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Liability of master for act of servant—Contrary to the conditions of his master's opium license, the servant sold a preparation of opium between sunset and sunrise. The master was not present, and there was no evidence to show that he had, directly or otherwise, authorized the illegal sale. Held that the master was not liable to a penalty under section 9 of Act I. of 1878. IN THE MATTER OF BHOOBUN CHUNDER SHAW ... Vol. XI. 464

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— Removal of goods with Owner's Permission—Abetment.—The owners of certain goods having been informed by a servant in their employ of a proposal made to him by the accused, that he should join him in removing and converting such goods to their own use, allowed the accused so to remove the goods: In the act of removal, the accused was arrested and charged with theft, and with having abetted the commission of the offence of theft. *Held* that no theft had been committed, the goods having been removed with the knowledge of the owners. *Held* further, that the accused was guilty of abetment, although the technical offence of theft had not been committed.—*THE EXPRESS v. TOYLUKHO NATH CHOWDHRY AND OTHERS.* Vol. III. 525

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109 and 363—Kidnapping—Lawful guardian of child—Custody of children.—A Hindu female child of about 6 years having been secretly removed by its mother in concert with the accused, and, without the knowledge or consent of its father, given in marriage, the accused was charged and convicted under sections 109 and 363 of the Indian Penal Code with abetting the offence of kidnapping. *Held* that there had been a taking of the child from the lawful guardianship of the father, and that the conviction was right. Although, under ordinary circumstances, the custody of the mother of an infant child, is the custody of the father, there is no authority in Hindu Law for the proposition that a mother can ever have a right to the custody of her legitimate children adverse to the father.—*PARAMESHWARI SURMA v. EMPRESS* ... Vol. XI. 6

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109, 495—see Abetment Vol. III. 81

—sections

114, 376, 497, 498—Criminal Procedure Code (Act X. of 1872), sections 283 and 296—Discharge—Commitment, Order for, by Sessions Judge after discharge by Magistrate—Commitment, Omission to allow accused to show cause against—Irregularity. Under section 296 of the Criminal Procedure Code, a Sessions Judge has power to direct a subordinate Court to inquire into offences in respect of which he considers a commitment to the Sessions Court should be made; but, where a person accused of an offence has been discharged under section 215 of the Criminal Procedure Code by a Magistrate duly empowered to try the offence, a Sessions Judge has no power to order the commitment of the accused without

Penal Code (Act XLV. of 1860) (ctd.)—

at least giving him an opportunity of showing cause against it. Where, however, such a commitment has been made, and a trial had thereunder, section 283 of the Criminal Procedure Code is a bar to the reversal of the judgment of the Sessions Court unless there has been an actual failure of justice caused by his error.—*IN THE MATTER OF KHAMIR* Vol. X. 8

—section

141—see Illegal Assembly. Vol. II. 12

—section

143—Unlawful Assembly.—The accused were convicted of being members of an unlawful assembly under the following circumstances: "There was a dispute of long standing as to certain land, no one being in undisputed possession. The accused went to sow the land with indigo, accompanied by a body of men armed with lathies, and prepared to use force if necessary, and the lathials kept off the opposing faction by brandishing their weapons while the indigo was being sown. *Held* that the accused were properly convicted of being members of an unlawful assembly under section 143, of the Indian Penal Code. *Shunker Singh v. Burmah Mahto.* 23 W. R. Cr. 25 distinguished.—*IN THE MATTER OF PEARY MOHUN SIKKAR* ... Vol. XIII. 80

—sections

147 and 324—see Criminal Procedure Code, section 454 Vol. VIII. 360

—section

148—Riot—Private defence.—A disturbance having been created with reference to the possession of certain churl land, the Sessions Judge, on appeal, found that certain persons had unlawfully trespassed thereupon, and that the accused had been justified in resisting the trespass by force. Inasmuch however, as he considered the accused had exceeded their right of private defence of their property, he convicted them of rioting under section 148 of the Penal Code. *Held* that, on the findings of the Judge, the conviction could not be supported, inasmuch as, on such findings, the persons convicted were not members of an unlawful assembly.—*IN THE MATTER OF KALEE MUNDLE* ... Vol. X. 278

—section

149—see Common object Vol. III. 49

—sections

149 and 325—see Criminal Procedure Code (Act X. of 1872) section 457 ... Vol. VI. 349

Penal Code (Act XLV. of 1860),—sections 154, 155, 157—Conviction and sentence—Non-resident partner—To constitute an offence under section 157 of the Indian Penal Code, it must be proved that the accused has hired or engaged, or employed, other persons for the purpose of an unlawful assembly, and it is not sufficient to show that some of the accused's servants have been taken from a district where men have a well known character as lathials, and had been in his service some time before the riot was perpetrated. A non-resident partner, or sharer, who has taken no active part in the management of the estate, cannot, like a resident sharer, be convicted under sections 154, 155, of the Indian Penal Code.—IN THE MATTER OF RADHA NATH CHOWHURY ... Vol VII 289

-----sections
167 and 466—Criminal Procedure Code, Act X. of 1872, section 453—Offences of same kind—The offences under sections 167 and 466 of the Penal Code respectively are not of the same kind within the meaning of section 453 of the Criminal Procedure Code (Act X. of 1872)—**SREE NUTH KUR v. EMPRESS** ... Vol. X. 421

-----section
173—see Summons ... Vol. II. 80

-----sections
182, 211—False charge—Summary procedure—Police-report—Where a person has instituted a charge found to be false by the police, a Magistrate, except under exceptional circumstances, is not justified, merely on a perusal of a police-report which has found a charge made to be false, in prosecuting the person, by whom such charge was preferred, summarily under section 182 of the Penal Code, but should proceed under section 211. When a charge is pronounced false by the police, no proceedings should be taken by a Magistrate *suo motu* until a reasonable interval has shown that the complainant accepts the result of the investigation. IN THE MATTER OF RUSSICK LALL MULLICK. Vol. VII. 312.

-----section
183—Warrant, Resistance to execution of—Attachment, Resistance to—Act VIII. (B.C.) of 1880 The accused were convicted under section 182 of the Penal Code, of offering resistance to an attachment of certain property ordered by the Deputy Collector in execution of a certificate under the Public Demands Recovery Act, VII. (B.C.) of 1880. The warrant under which the attachment was made stated that the return should be made on or before the 3rd February, and the alleged resistance was offered on the 4th February.

Penal Code (Act XLV. of 1860) (ctd)—
1883. Held that the conviction was bad.
ANUND LAL BERA v. EMPRESS
Vol XIII. 209

-----sections
187, 188—Regulation XX. of 1817, section 21—An omission or neglect by a zamindar, when called upon under section 21 of Regulation XX. of 1817, to nominate some one to fill the office of village watchman which had become vacant, is not an offence under either section 187 or section 188 of the Indian Penal Code. IN THE MATTER OF KALI PROSUNNA GHOSH Vol. VII. 575

-----section
188—Order in civil suit—Injunction, Disobedience to—Civil Court, Disobedience to—Section 188 of Act XLV. of 1860 applies to orders made by public functionaries for public purposes, but not to an order made in a civil suit between party and party.—IN THE MATTER OF CHANDRA KANT DE SIRCAR ... Vol VII 350

-----section
188—(Order prohibiting collection of rent—Act X. of 1872, section 518—In case of a dispute between rival parties as to the payment of rents by tenants, a Magistrate has no power, under section 518 of Act X. of 1872, to make an order that no rents should be collected until such time as the right and title of both parties should have been established by order of a competent Court, and a conviction under section 183 of the Penal Code for disobeying such an order cannot be sustained.—**PROSUNNO COOMAR CHATTERJEE v. THE EMPRESS** ... Vol VIII. 231.

-----section 188, conviction
under—see Criminal Procedure Code section 530. ... Vol. VII. 291

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188—see Criminal Procedure Code section 133 ... Vol XII. 231

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191—see False Evidence. Vol. II. 181

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191 and 193—see Criminal Procedure Code, section 463 ... Vol. VII 330

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191 and 193—False evidence given before a police officer—Inquiry, Preliminary—Criminal Procedure Code, (Act X. of 1872), section 119.—Persons giving false answers to questions put by a police officer conducting an inquiry preliminary to a proceeding before a Court of Justice may be

Penal Code (Act XLV. of 1860) (ctd.)—

convicted of giving false evidence under sections 191 and 193 of the Indian Penal Code. *Reg. v. Nim Chand Mookerjee*, 20 W. R., Cr., 41, followed.—IN THE MATTER OF JUGGERNATH SAHAI ... Vol. VIII. 236

section 193—Imprisonment, Sentence of—Criminal Procedure Code, section 297: clause 6—Under section 193 of the Indian Penal Code, it is obligatory upon the Court, in every case of conviction under that section, to pass some sentence of imprisonment.—*THE EMPRESS v. KHODAI SINGH* ... Vol. III. 527

section 193—see Code of Criminal Procedure, section 471 ... Vol. III. 599

sections 193 and 403—Criminal misappropriation—Fabricating false evidence—A person, having made a hole in the wall of his own house, broke open a box, and removed the contents, to which he believed himself entitled, but as to which there was a dispute, making the removal appear to have been the act of thieves from the outside, and entrusting the property to another person. He was charged with criminal misappropriation under section 403, and with fabricating false evidence for purpose of its being used in a stage of a judicial proceeding under section 193 of the Penal Code. It did not appear that any charge had been laid by the accused against any one in respect of the removal of the contents of the box. *Held* that the circumstances did not warrant the charges under either section of the Penal Code.—*THEWA RAM v. EMPRESS* ... Vol. X. 187

sections 193, 199, 471, 467—Forgery—False deposition—A petition not bearing the signature of the accused, and therefore not a declaration made or subscribed by him, cannot be made the foundation of a charge or conviction under section 199 of the Indian Penal Code, but a deposition on oath supporting such a petition, if false, justifies a charge under section 193 of the Code.—IN THE MATTER OF RAM REWAZ KOOWAR ... Vol. VII. 536

section 193—Fabricating false evidence—A certain alleged mokurrari tenure having been set aside by a Civil Court, the person who had claimed to hold such tenure, in depositing money in Court, in a petition stated that the deposit was in respect of the mokurrari tenure, whereupon he was charged and convicted under section 193 of the Indian Penal Code with fabricating false evidence. *Held* that the conviction was

Penal Code (Act XLV. of 1860) (ctd.)—

bad.—*DABEE MATHO v. RAM MOHUN MOOKHOPADHYA* ... Vol. X. 433

section 194—see complaint... Vol. I. 523

sections 196 and 471—Jurisdiction of Magistrate.—A Magistrate has no power, under section 156 of the Indian Penal Code, to convict an accused person who has been found to have used as evidence a document which he knew to be a forgery, but is bound to commit him to the Court of Session, the offence, being properly cognizable under section 471 of that Code.—*Reg. vs. Oodden Lall*, 3 W. R. Cr. Rul. 17, disapproved of.—IN THE MATTER OF KHERODE CHUNDEER MOZUMDAR ... Vol. VI. 118

section 201—False information.—Section 201 of the Penal Code is not intended to apply to the case of a person who appears to be the possible or probable offender, making statements exculpating himself by inculpating another.—IN THE MATTER OF BHIALA BIBI ... Vol. VIII. 207

section 211—see False Charge Vol. II. 389

section 211—Police reports—False charge—Procedure.—A man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him, and such opportunity should be afforded him not before the police, but before the Magistrate.—*EMPRESS v. KARIMDAD* ... Vol. VII. 467

section 211—False charge.—A Station Staff Officer having neither magisterial nor police powers, a false charge made before him does not amount to such a criminal proceeding as is referred to in section 211 of the Indian Penal Code. A "false charge," to make the above section applicable, must be made to a Court, or to an officer who has powers to investigate and send it up for trial.—IN THE MATTER OF JAMARIA ... Vol. VIII. 215

section 211—False charge—Criminal proceedings, Institution of—Suspicion, Statement to police of—A statement made to the police of a suspicion that a particular person had committed an offence is not a "charge" within the meaning of section 211 of the Indian Penal Code, nor does it amount to the institution of a criminal proceeding, and the person making the statement cannot, on the suspicion being proved to be

Penal Code (Act XLV. of 1860) (ctd.)—
 unfounded, be convicted under that section.
—IN THE MATTER OF BRAMANUD BHUTTA
CHARJEE Vol. VII. 233

tion 211—see sanction to prosecute
Vol. X. 4

tion 211—see Criminal Procedure
Code, section 468 Vol. X. 46

tion 211—see False charge
Vol. II. 315

section 211, Prosecution
under—see Dismissal of complaint
Vol. IV. 134

tion 211—see Criminal Procedure
Code, sections 147 and 470
Vol. VIII. 267

section 211—False charge—Procedure—Enquiry by
Police—Police report on charge made before
Magistrate.—A complaint having been made
 before a Magistrate, that officer, under sec-
 tion 146 of the Code of Criminal Procedure,
 directed an enquiry to be made by
 the Police, and, on such enquiry being
 held, it was reported to the Magistrate that
 the charge was false. Thereupon sanction
 to prosecute the complainant, was granted
 under section 211 of the Penal Code. *Held*,
 that, inasmuch as the Magistrate, on receipt
 of the police-report, had not given the com-
 plainant an opportunity of substantiating
 the complaint, the Court had no power to
 sanction the prosecution. *Empress v*
Karimdaul, 1 L. R., 6 Cal 495, (S. C.) 7 C.
 L. R. 467, and *Syud Nissur Hossen v. Ram*
Gulam Singh, 25 W. R., Cr., 10, followed.—
IN THE MATTER OF SAKHENA BIBI
Vol. VIII. 387

sections 211, 182 and
500—see Criminal Procedure Code,
Act X. of 1872, sections 147 and 467
Vol. IV. 413

section 211—False charge—Complaint before Ma-
gistrate—Investigation of charge made be-
fore police—Police reports—Procedure—Crim-
inal Procedure Code (Act X. of 1872), sec-
tion 147.—A charge laid against certain
 persons before the police having been re-
 ported false by that body, the person who
 made the charge complained to the Magis-
 trate of the District, who directed a fresh
 investigation. The charge was again re-
 ported false. The complainant thereupon
 filed a petition in which he alleged that the
 second investigation had not been properly
 conducted, and asked that further evidence

Penal Code (Act XLV. of 1860) (ctd.)—
 might be taken by a specified officer. No
 further investigation having taken place,
 the complainant was ordered to be prose-
 cuted under section 211 of the Indian Penal
 Code, and, on trial, was convicted and sen-
 tenced. On appeal to the High Court, it
 was held that the conviction was illegal, in-
 asmuch as an opportunity had not been
 afforded to the accused of producing all his
 evidence in support of the charge made by
 him. *In the Matter of Russick Lal Mullick*,
 7 C. L. R. 382, and *In the Matter of Biyogi*
Bhagut, 4 C. L. R. 134, followed. *Per*
MACLEAN, J.—The proper principle which
 should guide a Magistrate is, that, if no
 complaint is made before him after a reason-
 able time has elapsed from the conclusion
 of a police-inquiry, he would be justified in
 proceeding against a person, who has made
 a complaint to the police which has been
 found to be false; but, if a complaint is
 made, that complaint must be dealt with
 judicially. It is unfair, even then, to pro-
 ceed against the complainant without hear-
 ing any witnesses whom he may wish to
 examine. *Per MITTER, J.*—Although a
 Magistrate has power, under section 147
 of the Criminal Procedure Code to dismiss
 a complaint without examining witnesses,
 yet, in such a case, no sanction for prosecu-
 tion, under section 211 of the Penal Code,
 should be granted. *See In the Matter of*
Gyan Chunder Roy, 8 C. L. R. 267.—
IN THE MATTER OF CHUKRADAR POTTI
Vol. VIII. 289

section 211—Complaint before Magistrate—
False charge before police—Police reports—
Sanction to prosecute—Procedure—A sanc-
tion, for a prosecution under section 211 of
the Indian Penal Code, given without all the
witnesses, whom a complainant wishes to
produce, being heard in Court, is illegal.
In the matter of Chukradar Potti, post, p.
289, followed.—*EMPRESS vs. SHIBO BHARA.*
Vol. VIII. 265

section 211—False charge before Police—Com-
plaint before Magistrate—Police Reports—
Procedure.—Where a charge made to the
 police is found by that body to be false,
 there being no complaint made to the Ma-
 gistrate, it is not necessary, before a prose-
 cution under section 211 of the Indian
 Penal Code can legally be instituted against
 the person making the charge, that the
 charge should be first judicially investigated.
Empress v Abdul Husan, 1 L. R., 1 All.
 497, followed. *In the Matter of Biyogi*
Bhagut, 4 C. L. R., 134, distinguished. *IN*
THE MATTER OF THE EMPRESS vs. SALIM ROY.
Vol. VIII. 255

Penal Code (Act XLV. of 1860). sections 213, 214, and 406—Compounding offences.—The offence of criminal breach of trust, under section 406 of the Indian Penal Code, cannot, under the terms of sections 213 and 214 of the same Code, be lawfully compounded. IN THE MATTER OF A REFERENCE FROM THE CHIEF PRESIDENCY MAGISTRATE ... Vol. VI. 392

section 217.—Nature of such offence.—To constitute an offence, under section 217, Indian Penal Code, it is not necessary that there should be proof that the person whom the public servant intended to save from legal punishment had committed an offence, or was justly liable to legal punishment. QUEEN v. JOYNARAIN PATRO, 20 W. R. 66, distinguished.—AMFENOODEEN Vol. I. 483

sections 224 and 225A.—Custody for an offence.—A person, who was arrested under section 94 of the Criminal Procedure Code in order that he might be taken before a Magistrate and bound over to be of good behaviour, escaped from custody before he could be produced before the Magistrate. Held that, assuming he had been legally arrested, he could not be considered to be "lawfully detained in custody for any offence," and was, therefore, not liable to punishment under section 224 of the Indian Penal Code; and further that, inasmuch as he had not failed to furnish security for good behaviour he was not liable to punishment under section 225A. of the same Code. IN THE MATTER OF SHASTI NARAYAN PIT ... Vol. X. 290

section 283.—Obstruction in public way.—The accused were charged generally with obstruction in a public way, no danger, obstruction, or injury being alleged to have been caused to any person, and were summarily convicted. Held that the conviction could not be sustained under section 283 of the Indian Penal Code. EMPRESS vs. RAM SINGH AND OTHERS ... Vol. XI. 462

section 300, exception 5.—Culpable homicide—Consent, Risk of death taken by.—The 5th exception to section 300 of the Indian Penal Code extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risks of death with his own consent. It is not confined to the case where a man consents to suffer death, but extends to the case of an armed man who deliberately fights with another whom he knows to be armed, and thereby consents to take the risk of death. [See, however, *Empress vs. Rohimuddin*, 4 C. L. R. 285, where a contrary

Penal Code (Act XLV. of 1860) (ctd.).—opinion was expressed—ED] SUMSSHERE KHAN v. THE EMPRESS ... Vol. VII. 158

section 300, Except 5.—Culpable Homicide—Consent, Risk of death taken by.—Where a person knowing that there is a likelihood of his being killed, deliberately engages with others in a fight with deadly weapons and is killed, he cannot be said to have "taken the risk of death with his own consent" within the meaning of exception 5 of section 300 of the Indian Penal Code, and the persons taking part in the fight are liable to be tried under section 149 and 302 of that Code for murder. *Per AINSLIE*.—The 5th exception to section 300 of the Indian Penal Code applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result.—EMPRESS vs. ROHIM- UDDIN ... Vol. IV. 285

sections 304, 304A.—Where the accused, a snake charmer exhibited a recently captured venomous snake a cobra, without having extracted the poison, and in doing so placed it upon the head of a boy, who took fright and was bitten in the hand, and died shortly after from the effects of the bite, held that the accused was punishable, not under section 304A, for causing death by a rash or negligent act but under section 304 of the Penal Code, as having done an act which had resulted in death, with the knowledge that it was likely to cause death, but without any intention to cause death. THE EMPRESS vs. GONESH DOOREY ... Vol. XV. 580

section 321—see Verdict of Jury
Vol. II. 304

section 379—Distrain—Act VIII (F. C.) of 1869, section 6.—Persons removing property under the provisions of the Rent Law, relating to distraint ought not to be proceeded against under the Criminal Law, but the parties aggrieved by a wrongful distraint should have recourse to the remedy provided by Act VIII. (B. C.) of 1869.—SHAIKH AGHANI v. BHAGI HALWAI. Vol. VIII. 404

sections 405, 409—Jurisdiction—Adequate sentence—Court of Revision.—Where a Magistrate, erroneously holding that the offence committed was one under section 406, Indian Penal Code, over which he had jurisdiction, instead of under section 409, which was cognizable, only by the Court of Session, tried and sentenced the accused, it

Penal Code (Act XLV. of 1860) (ctd.)—

was held by the High Court as a Court of Revision that his proceedings were contrary to law, and he was directed to commit the case for trial, by the Court of Session. To constitute an offence under section 409 it is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity.—*IN THE MATTER OF RAM SOONDAR AND OTHERS* ... Vol. II. 515

section 411—British territory, stolen property brought into—Jurisdiction.—Where the accused committed a theft outside British territory, and brought the stolen property into British territory, it was held that he was rightly convicted of an offence under section 411 of the Penal Code.—*IN THE MATTER OF SUNKER GOPEL* ... Vol. VII. 411

sections 411 and 413—see Criminal Procedure Code, section 453 ... Vol. X. 466

section 441—Criminal Trespass—Annoyance—Bench of Magistrates, Absence of member of—Irregularity.—A built hut on portion of certain disputed land to which he laid claim, and was, on the prosecution of another claimant to the land, convicted of criminal trespass under section 441 of the Penal Code. Held that the conviction was bad, as, in erecting the hut, it was not the intention of the accused to annoy. *Per Curiam*: Loss or injury would naturally cause annoyance, but not the kind of annoyance contemplated by section 441 of the Penal Code. In a trial before a Bench originally constituted of a Stipendiary and two Honorary Magistrates, one of the latter, after the commencement of the trial, was absent, an important evidence was recorded in his absence. On the following day he returned to Bench, and signed the final order convicting the accused. Held that the conviction was bad on the ground of irregularity.—*SHUMBHU NATH SARKAR, v. RAM KAMAL GUHA* ... Vol. XIII. 212

sections 463, and 464—Forgery—Attempt to commit forgery—Preparation for commission of offence—False document—Attempt to commit an offence.—That which constitutes a false document within the meaning of sections 463 and 464 of the Indian Penal Code is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some other person to the document with a knowledge that the seal or signature is not his, and that he gave no authority to affix it. A person, therefore, who has given orders for the printing of certain

Penal Code (Act XLV. of 1860) (ctd.)—

receipt forms similar to those formerly used by a certain Company, and corrected the proofs of the same, it being his intention to use the receipt forms in order to commit a fraud, cannot be convicted of forgery until he had done some act towards making one of the forms a false document. Until a form had been converted into a false document, all that was done consisted in mere preparation for the commission of an offence. An attempt to commit an offence must be to do that which, if successful, would amount to the offence charged. *PER GARTH, C. J.*—The fact that the word "make" is used in section 64 of the Penal Code in conjunction with the words "sign," "seal," or "execute" clearly denotes that the making of a document does not mean writing or printing it, but signing or otherwise executing it.—*IN THE MATTER OF REASAT ALI* ... Vol. VIII. 572

section 463—Forgery—Intention to injure.—to constitute the offence of forgery as defined by section 463 of the Indian Penal Code, it is not sufficient to prove that, in making the document in respect of which the offence is charged, the accused knew that the document might injure, but it must be proved that it was his intention that it should injure, another.—*FEDA HOSSAIN v. EMPRESS* ... Vol. X. 184

section 471—see Forged Document ... Vol. VIII. 542

section 494—Conviction under—Evidence—Custom—Marriage, Offences relating to.—A conviction under section 494 of Indian Penal Code for marrying again during the lifetime of a husband or wife cannot be upheld where there is evidence to show that such marriages are not unusual among persons of the same caste as the accused, and it is not proved that such marriages are void.—*IN THE MATTER OF MUSSAMUT CHAMIA* ... Vol. VII. 354

section 498—Marriage, Evidence of—Evidence Act (I. of 1872), section 60.—To justify a conviction under section 498 of the Indian Penal Code, it is not sufficient for the prosecution to prove that the complainant and the woman in respect of whom the charge is made lived together as man and wife. It is necessary that facts constituting a valid marriage should be proved in accordance with section 60 of the Evidence Act. See *Pitambar Singh, In the matter*

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of, 5 C. L. R. 597 (F. B.), (S. C.) I. L. R.,
5 Cal. 544.—*EMPRESS v. ARSABD ALI*.
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**Perjury in respect of evidence in a
Civil Court**—*Evidence Act (I. of 1872),*
section 91—Deposition of witness—Civil
Procedure Code (Act X. of 1877), sections
182 and 183—Admissibility of deposition of
witness in trial against him for perjury.—
The deposition of a witness in a civil suit
taken down in a language other than that
in which the evidence was given is not
admissible in evidence in a prosecution
against him for perjury in respect of the
statements made by him unless the provi-
sions of sections 182 and 183 of the Civil
Procedure Code, Act X. of 1877, have been
complied with.—*IN THE MATTER OF*
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minal Procedure Code, section 237
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Procedure Code, section 119.
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**Port of Calcutta, Throwing ballast
or rubbish in.**—see Act XII. of 1875,
section 22 ... Vol. XII. 508

Possession.—*Magistrate's Inquiry—Code
of Criminal Procedure, sections 530, 533—*
Local Inquiry—Report.—In a proceeding
under section 530 of the Code of Criminal
Procedure, the Magistrate must decide the
fact of possession on evidence taken by
himself, and according to the result of a
local inquiry made under section 533 unless
the parties have consented to be bound
thereby. *PER PRINSEP F.*—The local
enquiry referred to in section 533 should be
restricted solely to some question relating
to the features of the property about which
the dispute has arisen; and should not be
directed to any matter which can be proved
before the Magistrate by oral evidence.—
IN THE MATTER OF BAIKUNT KUMAR
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—**sections 32 and 124.**—see Dismissal of complaint ... Vol. VIII. 106

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—**section 87, explanation 2.**—“*Revival of a Prosecution.*”—The revival of a prosecution, as mentioned in explanation 2 to section 87 of Act IV. of 1877. (The Presidency Magistrates Act), is not a continuation of the original prosecution, and upon such revival all the witnesses on whose evidence the prosecution intends to rely, as justifying the committal of the accused, must be examined before the Magistrate, and such of them as have been examined at the time of the original prosecution must be examined *de novo*. *EMPRESS v. CHUNDER NAUTH DUTT*, ... Vol. IV. 305

—**section 129.**—*Prosecution of Criminal case, Right to conduct.*—No person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case, under the Presidency Magistrates Act, without the sanction of the Presidency Magistrate. *EMPRESS v. BURTO KRISTO DASS AND ANOTHER* ... Vol. VI. 374

—**section 170.**—*Depositions, Right to copies of—*

Presidency Magistrates Act (IV of 1877) (contd.)—

Specific Relief Act (I. of 1877), section 45. All prosecutors whose charges are dismissed by a Presidency Magistrate are affected by the orders dismissing them, and are entitled, under section 170 of the Presidency Magistrates Act, to copies of the order and depositions; and, where a charge of cheating brought by the Bank of Bengal was dismissed by a Magistrate, the High Court, under section 45 of the Specific Relief Act, directed that copies of the orders and depositions which had been refused by the Magistrate should be made over to the attorney for the Bank. *EMPRESS v. DIONATH ROY* ... Vol. X. 190

—**section 234.**—see Insolvent Act, section 13. Vol. V. 458

—**sections 234, 235, Powers of Magistrates under—Magistrate, Stay of order for—Divorce under Mahomedan Law, Effect of.**—A Presidency Magistrate is competent to stay the operation of an order, made under section 234 of Act IV. of 1877, for maintenance of a wife, and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order, which must be taken to have been a proper and legal order when it was made; and he is competent to try all questions which affect the rights of a woman to receive maintenance. For the purposes of Chapter XVIII. of Act IV. of 1877, a Magistrate must, when a question of divorce arises, determine, on such evidence as may be before him, whether there has or has not been a legally valid divorce. *ABDUR RAHMAN vs SAKHINA* ... Vol. IV. 21

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Private defence—Plea—Acquittal—Evidence Act (l. of 1872), section 105.—Where the accused had been convicted of riot under section 148, and of grievous hurt under section 325, of the Penal Code, the Sessions Judge on appeal held that the complainants had themselves been the aggressors, and that the accused had merely exercised the right of private defence; but, inasmuch as they had not set up the plea of private defence, he considered it was not competent to him to set aside the conviction. *Held* that, on the finding of the Sessions Judge, the accused were entitled to an acquittal. *IN THE MATTER OF KALI CHURN MOOKERJEE* Vol. XI. 232

Private Defence, right of—How to be pleaded—section 105, Indian Evidence Act.—It is for those who raise the plea of private defence to prove it. The act charged cannot be denied, and the plea of private defence raised as an alternative. It raised a full account of the occurrence must be given in evidence.—*JAMSHUR SIRDAR AND OTHERS* Vol. I. 62

—see Penal Code, section 148 Vol. X. 276

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—**in cross cases—Riot—Prosecutions for riot by rival sections—Examination of witnesses in cross criminal cases—Practice—Revision, Powers of the High Court as Court of—Criminal Procedure Code (Act X. of 1882), section 454**—Where a riot occurred, and complaints were lodged by both parties, the witnesses for the prosecution were in each case in turn examined in chief, then also in turn cross-examined, and in like manner re-examined, and the Court there upon discharged the accused in one case, and called upon the accused in the other to go into his defence: *Held* that the procedure adopted was improper, and that there should be new trial. *Empress v. Chandra Nath Sirkar*, I. L. R., 7 Cal. 65, (S. C.) 8 C. L. R. 352, followed. The provisions of section 439 of the Criminal Procedure Code in no way affects the powers of the High Court as a Court of Revision vested in it by the High Courts Act.—*CHAKOWRI LAL v. MOTI KURMI* Vol. XIII. 275

—**in trials of members of opposing factions in riots**—see Criminal Procedure Code (Act X. of 1872), sections 250 and 265 Vol. VI. 521

—**under Stamp Act**—see Stamp Act (l. of 1879) sections 37, 40 Vol. X. 365

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— **servant**—Municipal Corporation
— **Public nuisance**—Corporation of Calcutta
— **Indian Penal Code**, section 21—Presidency Magistrates Act IV. of 1877, section 39—Act IV. (B. C.) of 1876.—The protection extended by section 39 of Act IV. of 1877 (the Presidency Magistrates Act) to certain individual public servants does not extend to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance. *Per AINSLIE, J.*—The right to prosecute any person or body of persons by whom any one may have been injured is a common right which can only be limited by special legislation. Such a right cannot be taken away, unless by express words, or by necessary implication. *Per WHITE, J.*—It is doubtful whether a corporation is a public servant at all; but assuming it is, neither the Corporation of Calcutta nor any of its members is a public servant removable by Government. Where a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. Indian Penal Code, section 21; Presidency Magistrates Act, section 39; Act IV. (B. C.) of 1876, discussed. *R v. Birmingham and Gloucester Railway*, 3 Q. B. Rep. 223; *R. v. Scott*, 3 ditto 547; and *R. v. The Great Northern of England Railway*, 9 ditto 315 cited.—IN THE MATTER OF THE EMPRESS v. THE MUNICIPAL COMMISSIONERS OF CALCUTTA ... Vol. II. 520

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Recognizance—Criminal Procedure Code (Act X. of 1872), section 489—Penalty under recognizance bond, Remission of.—Where the penalty under a recognizance bond has been forfeited, neither the Magistrate nor the High Court has power to reduce the amount of the penalty.—IN THE MATTER OF NAKI HAZI ... Vol. VIII. 72

— **Forfeiture**—When a Magistrate has before him the fact that a person convicted by him of an offence attended with violence was under recognizance to keep the peace, and does not nevertheless proceed to forfeit such recognizance, it must be held that he thought it unnecessary to do so. Proceedings taken after the lapse of a considerable period are bad and contrary to the intention of the law.—*In re RAM CHUNDER LALLA* Vol. I. 134

— **Forfeiture of**—Security to keep the peace—Forfeiture of Recognizance—Penalty—Act X. of 1872, section 502.—On the 20th of April 1877, A was bound down to keep the peace for one year. On the 14th of January 1878, he was convicted of an offence and sentenced therefore to fine and imprisonment, but no order was made for the recovery of the penalty, though the Magistrate knew that the recognizance had been forfeited. On the 2nd of April 1878, the Magistrate, at the instance of a third party, called upon A to show cause why the penalty of the recognizance should not be paid, and a warrant for its recovery was issued on the 6th of June 1878. Held that the warrant must be quashed, on the ground that the Magistrate having inflicted a sentence of fine and imprisonment with the knowledge that the recognizance was forfeited he was not competent to inflict a further penalty on a reconsideration of the circumstances.—IN THE MATTER OF PARBUTI CHURN BOSE ... Vol. III. 406

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Refreshing memory—Right of opposite party to inspect writing used to refresh memory—Medical evidence—Criminal Procedure Code (Act X. of 1872), section 323—Charge to jury—Misdirection—Penal Code—(Act XLV. of 1860), sections 34 and 149—Constructive murder—*Per FIELD, J.*—The

Refreshing memory (contd.)—

grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are threefold: (1) to secure the full benefit of the witness's recollection as to the whole of the fact; (2) to check the use of improper documents; and (3) to compare his oral testimony with his written statement; *

* but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matter contained in the same series of writings. If the right to look at a particular writing before or at the time when a witness uses it to refresh his memory in order to answer a particular question be not then exercised, it cannot be retained throughout the subsequent examination of the witness. *Per FIELD, J.*—In order that the examination of a Civil Surgeon or other medical witness may be admissible under section 323 of Act X of 1872 against any individual accused person, it must have been taken by the Magistrate in his presence. (See now section 509 of Act X. of 1882.) *Per FIELD, J.*—It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts; and, if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. *Per FIELD, J.*—It may be a question whether a person, constructively guilty of murder under section 34 of the Penal Code, can be said to have committed the offence of murder within the meaning of section 149 of that Code so as to make other persons by a double construction guilty of murder.—JHUBBOO MAHTON • THE EMPRESS ... Vol. XII. 233

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— **to give Receipt of Summons**—see Summons ... Vol. II. 80

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Reply, Right of prosecutor to—see Criminal Procedure Code sections 289, 292, 303 and 342 ... Vol. XIII. 358

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Retail Sale—see Excise Act VII. (B. C.) of 1878, sections 15 and 61. Vol. X. 155

Retrial—Acquittal—Failure of Justice—Code of Criminal Procedure, sections 220, 210—**Charge—Preparing a Charge**—A man accused of theft was acquitted by the Deputy Magistrate under section 220 of the Code of Criminal Procedure. The District Magistrate, at the instance of the Police, ordered the case to be re-tried. It appeared that the Deputy Magistrate had not framed any charge, but that no failure of justice had been occasioned by his not doing so. *Held*, that the Magistrate had no power to order a re-trial, without first setting aside the order of acquittal; and that he had no power to set aside the order of acquittal as the case had not been appealed to him.—IN THE MATTER OF JOJA PASHAN ... Vol. III. 131

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Rioting—Attacking party—Right of private defence.—Where both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that that party was acting within the legal limits of the right of private defence.—KALEE BHAPARE AND OTHERS. Vol. I. 521

Rival Factions, cross cases of riot against—see Procedure in cross cases ... Vol. XIII. 275

Road, Order to open—see Order to open Road ... Vol. II. 509

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Sanction to prosecute—*Criminal Procedure Code (Act X. of 1872), section 468—Indian Penal Code (Act XLV. of 1860) section 111—Abetment of bringing false charge—Misdirection.*—There being nothing in the law requiring that sanction to prosecute under section 211 of the Indian Penal Code should only be granted upon application by a private prosecutor, a District Magistrate is competent under section 468 of the Code of Criminal Procedure of his own motion to direct a prosecution where a complaint has been entertained and found to be false by a Magistrate subordinate to him. There being no abetment of an offence after it has been committed, a person cannot be convicted of abetting the offence of instituting a false charge on evidence which shows only that he gave evidence in support of a charge found to be false.—Duty of Judge in charging a jury discussed.—IN THE MATTER OF JUGUT MOHINI DASSEE ... Vol. IX. 4

On an application to a Moonsiff for sanction to prosecute, the following order was made upon the petition: "If the petitioner thinks there is sufficient evidence against A, I have no objection to give such sanction to." Held that the order was not a sufficient sanction.

[Criminal.]

Sanction to prosecute (contd.)—

to support a prosecution.—JADUNATH HAZRA v. ANNODA FROSAID SIRCAR Vol. XI. 53

—see Criminal Procedure Code, (X. of 1872) sections 147 and 467 ... Vol. IV. 413

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—see Penal Code, section 211 ... Vol. VIII. 265

—under section 470 of Criminal Procedure Code—see Criminal Procedure Code, sections 141 and 470. Vol. VIII. 267

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Secondary Evidence to prove unattested confessions—see Code of Criminal Procedure, (Act X. of 1872) section 122 and 346 ... Vol. IV. 137

Second Conviction—section 75, Indian Penal Code—sentence.—Where, soon after his release on expiry of a sentence of seven years' imprisonment on conviction of "receiving stolen property acquired by dacoity," a person is convicted of house-breaking and theft, he is sufficiently punished by a sentence of seven years in transportation; a sentence for transportation for life is too severe. It is not the intention of the Legislature that a previous conviction should so enormously enhanced the heinousness of petty offences.—SHAMJIE NASHVO ... Vol. I. 481

Security for Good Behaviour—see Criminal Procedure Code (Act X. of 1877) sections 505, 510. Vol. VI. 128

—mode of fixing the amount of—see Criminal Procedure Code, section 509 Vol. I. 95

Security to keep the peace—section 491, Code of Criminal Procedure—Evidence to be recorded.—A Magistrate is not competent to require persons to give security to keep the peace until he has adjudicated,

C.L. R.—122,

Security to keep the peace (contd.)—

on evidence taken in their presence, that they have by their conduct rendered this necessary. *Rajah Run Bahadoor Singh v. Ranee Telesuree Koor*, 22 W. R., Crim., 79, cited and followed.—IN THE MATTER OF UMDA KHANUM ... Vol. III. 72

—**Section 491, Code of Criminal Procedure—Probable resistance to lawful Collection of rent.**—The petitioner, a *tehsildar*, applied to the Police for assistance to protect him while distraining the crops of certain ryots for arrears of rent. On this being reported to the Magistrate, he required the petitioner to furnish security to keep the peace on the ground that any riot which might result from the resistance of the ryots to the attachment of their crops would be attributable to his act. This order was set aside by the High Court as illegal, because the Magistrate had not found that the petitioner himself was likely to commit a breach of the peace.—IN THE MATTER OF SHRO SURN LALL ... Vol. III. 280

—**to keep the Peace**—see Recognizance, forfeiture of Vol. III. 466

Sentence—see second conviction Vol. I. 481

—**Commuted**—see Death, execution of Sentence of ... Vol. II. 215

—**to commence at future date**—see Criminal Procedure Code sections 339 and 340 ... Vol. VII. 393

—**on appeal from acquittal, Commencement of**—see Criminal Procedure Code, section 457 Vol. VI. 349

Separate Charges—see Criminal Procedure Code section 454 Vol. VIII. 390

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—**Court, Cases Exclusively triable by**—see Criminal Procedure Code ... Vol. III. 599

—**Judge, Dissentient opinion of**—see Verdict of Jury ... Vol. I. 275

—**Judge—Previous trial of other accused**—A Sessions Judge, holding a second trial, should not comment on the conduct of a previous trial—*Jumshur Sirdar and others* ... Vol. I. 62

Shia wife, Maintenance of, by moot marriage—see Criminal Procedure Code section 536 ... Vol. XI. 237

Special Powers of Magistrates—see Criminal Procedure Code, sections 30, 34 and 209 ... Vol. XIII. 375

Specific Relief Act, (I. of 1877), section 45—see Presidency Magistrates Act, section 170 ... Vol. X. 190

Splitting offences—see Summary Jurisdiction ... Vol. III. 44

Stamp Act, (XVIII. of 1869), section 48—see Trial ... Vol. II. 179

—**(I. of 1879), sections 37, 40—Evasion of stamp duty—Intention—Procedure—Interpretation of fiscal Statutes.**

—Six persons, the members of a *punchayet*, as arbitrators, decided a dispute between two of their fellow-villagers, as to a piece of land, and delivered their judgment or award in writing. Subsequently the award was filed by one of the parties thereto in the Moonsiff's Court, and, not being stamped, was impounded by the Moonsiff, who forwarded it to the Collector. That officer directed that the writer of the document should be prosecuted, and accordingly the six persons, who acted as arbitrators, were summoned by the Deputy Magistrate, to whom the case was entrusted, and by him fined Rs. 25 each. Held that the conviction was illegal, inasmuch as the procedure laid down by the Stamp Act, (I. of 1879), had not been, as it ought to have been, strictly followed. *EXPRESS vs. SODDAXUND MAHANTY* ... Vol. X. 365

Stamp duty, evasion of—see Stamp Act (I. of 1879), sections 37 and 40 Vol. X. 365

Statement of accused, Refusal of Court to take—see Inspection of books, the subject of charge of theft Vol. X. 54

—**made in absence of accused**—see Evidence Act, section 50 Vol. VIII. 352

—**by Deceased as to cause of Death**—see Evidence Act (I. of 1872), section 32 ... Vol. VI. 278

—**to Police**—see Criminal Procedure Code, section 119 Vol. XI. 569

Statutes, Interpretation of fiscal—see Stamp Act (I. of 1879) sections 37, 40 ... Vol. X. 365

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Stolen Property—Bank note—Goods—Contract Act—Right of appeal by complainant, the robbed person—Code of Criminal Procedure, sections 286, 418, 419—A Government currency note stolen from A was cashed with B. The thief was tried and convicted for the theft, and after this conviction the Magistrate ordered the note to be returned to B, held that the Sessions

Stolen Property (contd.)—

Judge was, under section 419 of the Code of Criminal Procedure, the proper person to deal with an application made by A for the reversal of that order. Where a stolen currency note has been delivered to a bona fide holder for value, the Court will not, on conviction of the thief, restore the note to the person from whom it was stolen. A Government currency note is not "goods" within the meaning of the Contract Act.—IN THE MATTER OF CAPTAIN MITCHELL Vol. I. 339

Sureties—see Criminal Procedure Code (Act X. of 1877), sections 305, 510 Vol. VI. 128

Summary Jurisdiction—Splitting Offences—Offences triable summarily—Void Proceedings—Code of Criminal Procedure, section 34—A Magistrate should not split up an offence for the purpose of giving himself summary jurisdiction. If he does so, and the offence is not triable summarily, the proceedings are void, under section 34 of the Code of Criminal Procedure.—IN THE MATTER OF ABDUL KADIR Vol. III. 44

Procedure—see Penal Code sections 182 and 211 ... Vol. VII. 382

Trial—Section 222, Code of Criminal Procedure—Jurisdiction—Section 34, cl. iv.—Where, on the facts found by a Magistrate, an offence is established which he cannot try summarily, he is not competent to convict for an offence made up of only some of those facts in order to give himself jurisdiction. Such proceedings are void under section 34, cl. IV. of the Code of Criminal Procedure, because he was not empowered by law to try the offender summarily.—IN THE MATTER OF CHUNDER SUGOR SOOKUL ... Vol. I. 434

Act XXI. of 1856, section 49—Confiscation—Fine—Code of Criminal Procedure, section 222—The confiscation which is provided for by section 49, Act XXI. of 1856, is merely a consequence of the conviction, and does not form part of the punishment for the offence. An offence under that section, which is punishable with fine, may, therefore, be tried summarily by a Magistrate under section 222 of the Code of Criminal Procedure, Act X. of 1872. Khetra Mohun Chowrunghy 22 W. R., 43, and Juddoo Nath Shyba, 23 W. R., Cr., 33, overruled.—IN THE MATTER OF BAIDYANATH DAS, Vol. I. 442

Trial.—Section 222, Code of Criminal Procedure—Jurisdiction—Police investigation—Discharge by Magistrate of

Summary Trial (contd.)—

persons sent in by Police.—It is the nature of a complaint which should determine whether a case should be tried summarily under section 222 of the Code of Criminal Procedure. Whether the acts complained of amount to an offence which a Magistrate cannot try summarily, he is not competent to hold a summary trial. *In the Matter of Dwarkanath Mojoondar*, 21 W. R., 89, and *Chunder Seekor Thakoor*, 22 W. R. 29, followed. When a Magistrate has referred a case for police investigation and the police arrest certain persons, and send in evidence against them, he is bound to consider that evidence before he discharges them. IN THE MATTER OF BEPUTOOLLA v. NAJIM SHEIKH AND OTHERS ... Vol. II. 374

— see Criminal Procedure Code, section 227. Vol. II. 511

Summing-up in trials with assessors.—see Criminal Procedure Code, section 309 ... Vol. XII. 506

Summons.—Refusal to give receipt for—Indian Penal Code, section 173—The refusal to give a receipt for a summons is not an offence under section 173, Indian Penal Code. *Queen v. Kolya bin Fakir*, 5 Bom. 34, *Crown Cases*, followed.—IN THE MATTER OF BHOOBUNESHWAR DUTT, PETITIONER ... Vol. II. 80

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Superintendent of Tributary Mahals, Powers of.—see Tributary Mahals, Vol. IX. 93

Suspicion, statement to Police of.—see Penal Code, section 211. Vol. VIII. 233

Symbolical possession under decree of Civil Court, Effect of.—see Criminal Procedure Code, Act (X. of 1872), section 530 ... Vol. V. 200

Theft.—see Penal Code, section 103. Vol. III. 525

Thoroughfare, obstruction to.—see Criminal Procedure Code, section 521. Vol. VIII. 399

Title, how far evidence of possession.—see Criminal Procedure Code, section 530 ... Vol. VIII. 245

Transfer of case—see criminal Procedure Code (Act X. of 1872) section 64 Vol. VI. 979

Transfer of case.—see Criminal Procedure Code, (Act X. of 1872) section 48 Vol. X. 239

Trial.—*Act XVIII. of 1869 (Stamp Act) section 43*—Trial by the officer authorized to institute and conduct the prosecution. Where an officer has been authorized by the Collector under section 43, Act XVIII. of 1869, to institute and conduct the prosecution in certain cases, he is not competent also to try them. *Queen v. Nuddya Chanda Poddar*, 24 W. R., Cr., 1, followed.—**IN THE MATTER OF GANGADHUR BHONYA AND OTHERS (CONVICTS)** ... Vol. II. 179
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Tributary Mehals, Criminal Jurisdiction of Superintendent of.—*Superintendent of Tributary Mehals, Powers of—Scheduled Districts Act (XIV. of 1874), Schedule I.—Act XV. of 1874 Schedule VI., and section 3—Government, Authority of orders of, as to the Criminal Jurisdiction of the officers of the Tributary Mehals*—A complaint having been preferred to the Rajah of Mohurbhunj, one of the Tributary Mehals charging the petitioner and others with libel, the Rajah issued processes through the Magistrate of Midnapore for the attendance of the accused, who were residents of that district. The accused then applied to the Magistrate that the charge should not be tried by the Rajah, and, upon reference to the Superintendent of the Tributary Mehals, the case was transferred to the Magistrate of Midnapore, an officer invested with certain powers as Assistant to the Superintendent of the Tributary Mehals. Two of the accused were summoned before the Magistrate, and a charge was drawn on the 13th December 1880 under section 500 of the Indian Penal Code, purporting to be drawn up by the Magistrate as Assistant Superintendent of the Tributary Mehals. On the 18th January, the complaint was withdrawn regarding one of the accused, and the case proceeded against the other, who now moved the High Court to set aside the proceedings as having been made without jurisdiction. It appeared that, on the 12th December 1870, the Secretary of the Bengal Government informed the Magistrate of Midnapore that, as *ex officio* Assistant Superintendent of the Tributary Mehals, he was empowered to try all offences committed within the Tributary Mehals not punishable with death, and to pass sentence not exceeding seven years, submitting his proceedings in each case to the Superintendent. On the 8th August 1874, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a Sessions Judge, with power to hear appeals from sentences passed by Subordinate Officers in Tributary Mehal cases. Mohurbhunj was not specified among the scheduled districts of Bengal

Tributary Mehals, Criminal Jurisdiction of Superintendent of (ctd.)—

in Schedule I. of Act XIV. of 1874 or Schedule VI. of Act XV. of 1874. *Held* that Mohurbhunj was a part of British India. *Per PRINSEP, J.*—That, although part of British India, and, as such, and by reason of its not being a scheduled district, it would ordinarily be subject to the general law, Mohurbhunj is specially exempted therefrom by Regulations XII., XIII., XIV. of 1805, and, except under special regulation, could not be made subject to any general law. *Per*—CUNNINGHAM, J.—That, though Mohurbhunj is not one of the scheduled districts, the preamble to Act XIV. of 1874 shows that those districts were not the whole, but merely among the parts, of India, which had either never been brought within, or had been removed from, the ordinary jurisdiction of the Courts; that, consequently, with the saving clause, section 10, Act Xb. of 1874, it would not be subject to the ordinary law, Regulations XIII. and XIV. of 1805 being still in force. *Per Curiam.*—That the Magistrate of Midnapore was not competent in Midnapore to hold a trial of an offence committed in Mohurbhunj. *Per PRINSEP, J.*—That, the Local Government was not competent to invest the Magistrate of Midnapore or the Commissioner of Cuttack with criminal powers in Mohurbhunj. Regulations and Acts relating to the Tributary Mehals discussed.—**IN THE MATTER OF HURSEE MOHAPATTER v. DINO BUNDHOO PATI** ... Vol. IX. 93

Unlawful Assembly—see Common object ... Vol. XI. 49

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Unlicensed Vendor—see Excise Act VII. (B. C.) of 1878, sections 53, 60 and 61 Vol. XII. 451

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Verdict of Jury—Section 263, Code of Criminal Procedure—*Dissentient opinion of Sessions Judge—High Court—Per Curiam*—A very large discretionary power is vested in the High Court by section 263 of the Code of Criminal Procedure. No fixed rules can be laid down for the exercise of that discretion in every instance; and the decision in such case submitted must depend upon its own peculiar circumstances. *Per* GARTH, C. J., and PRINSEP, J. (MARKBY, J., contra).—The rule laid down in *QUERN v. NAZIR MUNDUL*, 25 W. R., 25, Criminal Rulings, goes too far. PRINSEP, J. (MARKBY, J., contra).—The law does not prevent a Sessions Judge from asking a

Verdict of Jury (Contd.).—

Jury regarding the grounds for their verdict, and, such a course is desirable in the ends of justice.—(See *QUEEN v. SUSTIRAM MUNDUL*, 21. W. R.; *THE EMPRESS v. MUKHUN KUMAR* ... Vol. I 275

—Section 263, Code of Criminal Procedure—Verdict of jury disapproved by Sessions Judge—Voluntarily causing hurt—Section 321, Indian Penal Code—Hurt intended for one person and carried to another—When a man strikes a woman with a child in her arms on that part of her person which is close to the head of the child, it must be presumed that he knew that he was likely to strike the child and endanger its life. Such an act amounts to voluntarily causing grievous hurt to the child, though it may not have been the intention of the person to strike the child. When a Sessions Judge submits a case under section 253 of the Code of Criminal Procedure to the High Court, because he disagrees with the verdict of the jury, acquitting the prisoner, he is bound to state the exact offence of which, in his opinion, the prisoner should have been convicted.—*EMPRESS OF INDIA, IN THE MATTER OF SAHAI RAI* ... Vol. II 304

—see Criminal Procedure Code, section 263 ... Vol. XI. 169

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Weight of Evidence, Verdict of jury when against—see Criminal Procedure Code, section 263. Vol. XI. 169

Wholesale, sale of liquors by—see Act VII. (B. C.) of 1878, section 60 Vol. VIII. 152

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Withdrawal of order—Section 521, Code of Criminal Procedure—Value of Evidence—Court of Revision.—When after enquiry a Magistrate finds that there is no sufficient cause for proceeding under section 521 of the Code of Criminal Procedure, he is competent to let the matter drop. As a Court of Revision, the High Court will not enter upon a consideration of the value of the evidence on which the Magistrate decided so to Act.—*IN THE MATTER OF SHONAI PARAMANIC* ... Vol. I. 486

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CALCUTTA

HIGH COURT REPORTS.

ORIGINAL, APPELLATE, AND REVISIONAL.

[CRIMINAL APPELLATE JURISDICTION.]

[FULL BENCH.]

TITU MYA.

APPELLANT

Examination of accused—Record of questions asked—Omission of Magistrate.

The omission of a Magistrate to have recorded in the vernacular the questions asked in the examination of the accused person does not necessarily render that examination inadmissible as evidence.

For Appellant: *Baboo Jey Gobind Shor*.

For Government: *Baboo Jugdanund Mookerjee* (Junior Government Pleader).

THIS case was referred for the opinion of the Full Bench by MACPHERSON and BIRCH, in the following terms:—

In this case the prisoner has been convicted of murder, the offence having been committed on the 10th of September last.

He was committed by Mr. Luttmann-Johnson, the Magistrate of Cachar, for trial before the Sessions Court.

In the course of the enquiry preliminary to commitment, the prisoner was twice examined by the Magistrate. If the statements made by him on the occasion of these examinations are admissible in evidence, the conviction can be supported; but if

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Case stated.

MACPHER-
SON, J.

those statements are not admissible, then there clearly is no evidence to warrant a conviction.

The question is, whether the statements made by the prisoner on those two examinations are under the circumstances admissible.

The first examination of the accused was on the 21st of September. The Magistrate, in his own hand, recorded fully in English each question and answer; and at the end he signed the memorandum, and added:—"Note.—The police connected with the case were carefully excluded from the Court, and the accused was given every opportunity of correcting any of his statements. His manner was that of a person speaking the entire truth." And this note is initialled by the Magistrate and dated the same, 21st of September.

Simultaneously a mohurir, in the presence of the Magistrate, recorded in the vernacular all the answers given by the prisoner. But the questions put are not recorded in the vernacular. At the end of this vernacular record the Magistrate certifies:—"Taken in my presence and hearing, and contains accurately the whole of the statement made by the accused person,"—and this certificate is signed and dated by the Magistrate.

To this the Magistrate appends a "Note: The clerk has unfortunately omitted questions. They are, however, entered fully in my memorandum,"—and this he signs.

After that, a few words seem to have been added on the same day by the prisoner. They are recorded by the Magistrate in his own hand in his memorandum and simply signed by him, and they are recorded by the clerk in the vernacular and initialled by the Magistrate.

On the 12th of October the prisoner was further examined by the Magistrate. The questions and answers are fully recorded both in the English memorandum and in the vernacular, and the record is duly attested by the Magistrate.

But neither the record of the examination of the 12th October, nor the previous record of the examination of 21st September, were signed by the accused person, as required by section 346. Nor is there anything to show that the record of the examination—every question and every answer—was shown or read to the accused as directed by the first clause of section 346.

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SON, J.

In this particular case we have no doubt that the examination of the accused was in fact carefully conducted by the Magistrate, and that all the questions and answers are accurately recorded, as regards the first examination in the Magistrate's English memorandum, and as regards the second examination, in both the vernacular and English. The error is one which, in our opinion, does not prejudice the prisoner, unless we are bound to hold as matter of law that the mere omission to comply with the provisions of section 346 does prejudice him.

The Bombay High Court apparently considers that such an error necessarily does prejudice the prisoner and is incurable; and that the statement of the accused, unless recorded strictly as directed by section 346, is inadmissible (see 10 Bombay Reports, 166). But the last clause of section 346 seems to contemplate the admissibility of such records, although not strictly in form, *provided the error does not prejudice the prisoner.*

The following cases bearing on the subject are reported, 21 W. R., 5; 24 W. R., 29, 42; 25 W. R., 25; 11 Bombay Reports, pp. 44 and 237; 1 Indian Law Reports, Bombay, 291.

As the question is of great importance, and opinion seems divided, we think the matter should be referred for the decision of a Full Bench.

The questions referred for the opinion of the Full Bench are:—

First.—Whether the omission to obtain the signature or attestation of the accused person, as directed by section 346, necessarily prejudices the prisoner within the meaning of the last clause of that section and renders the record inadmissible?

Second.—Whether the omission to obtain the signature, &c., of the accused person, as required by section 346, or the omission to record in the vernacular the questions put to the accused person, or both these omissions taken together, necessarily render the record inadmissible, even although it appears from the Magistrate's certificate that taking the English memorandum, together with the vernacular, the whole of the questions and answers are fully recorded?

Third.—Whether the defect can be cured by taking further evidence now, supposing that it can be proved that in fact the record was duly read to the accused person?

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APPELLANT.

The judgment of the FULL BENCH (1) was delivered by
GARTH, C.J. :—

Judgment.

GARTH, C.J.

As regards the first point stated for our opinion it now appears that the statement made by the prisoner does purport to bear his signature; and in the absence of any evidence to the contrary, and there being no defect in the certificate endorsed by the Magistrate in compliance with the directions of section 346, we must take it that the signature is that of the accused person.

Then, secondly, as to the omission on the part of the Magistrate to record in the vernacular the questions put to the prisoner, it is clear that in this instance the prisoner is not, and cannot have been, prejudiced in any way by the omission. The questions were of such a nature that it is perfectly immaterial to the sense and meaning of the prisoner's statement whether they were recorded or not.

The case will go back to the Bench which referred it for disposal.

(1) GARTH, C.J., JACKSON, MACPHERSON, MARKEY and AINSLIE. JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF HIRAN MIYA *alias* } PETITIONER.
 ABDUOL WAHID (*Convict*). . . }

1877
 July 12.

Section 25, Evidence Act—Confession to a police-officer.

Under section 25 of the Indian Evidence Act (I. of 1872), a confession made to a police-officer, is inadmissible in evidence, except so far as is provided by section 27. It is immaterial whether such police-officer be the officer investigating the case—the fact that such person is a police-officer invalidates a confession.

THE petitioner was convicted by a Magistrate, and his appeal was dismissed by the Sessions Judge of Sylhet.

For Petitioner: *Baboo Fay Gobind Shome*.

For Govt.: *Baboo Jugdanund Mookerjee* (*Junior Government Pleader*).

The facts of the case and the arguments before the High Court (1) are sufficiently set forth in the judgment of that Court, which was delivered by

AINSLIE, J. :—

AINSLIE, J.

We think that the conviction in the present case must be set aside. That conviction is substantially based upon the statement made by the accused to one Mosun Ali, the Sub-Inspector of Thanmah Abidabad. The Judge says that "it is perfectly true that Mosun Ali is a police-officer; but it appears from his evidence that he had come to Sylhet to give evidence in another case; that he was in no way connected with the investigation of this case; and that the appellant came to him as to a personal friend, and asked his advice of his own accord."

The 25th section of the Evidence Act says, without limitation of qualification, that "no confession made to a police-officer shall be proved as against a person accused of any offence."

It has been contended that this section is to be read as if it ran "no confession made to a police-officer investigating a case";

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aliasABDOOL
WAHID.

Judgment.

AINSLIE, J.

that in the present instance the police-officer, to whom the confession was made did not even belong to the same Police Division; that he was only casually brought into contact with the accused; and that, therefore, this section cannot apply.

It appears to me that section 26 shows that this is not the true construction of the 25th section. That section deals with confessions made in the presence of a police-officer who has the custody of an accused person, that is, of a police-officer who is concerned more or less in the investigation of the case; and those confessions are absolutely excluded; whether made to a police-officer or to any other person, unless made in the immediate presence of a Magistrate. This section would necessarily include the 25th section if it is to be read as suggested, and thus make it useless. But this could not be intended, and therefore it is clear that the proper construction is one that excludes confessions to a police-officer under any circumstances, or to any one else, which the person making it is in a position to be influenced by a police-officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the Police.

In the case reported in 1 Indian Law Reports, page 207, the learned Chief Justice expresses the opinion that the term "police-officer" should be read, not in a strict technical sense, but according to its more comprehensive and popular meaning. In that case, although it was admitted that the confession was made to Mr. Lambert at a time when he was not acting as a police-officer, but as a Magistrate, and that there was no danger that a gentleman in Mr. Lambert's position would extort a confession, the Court considered itself bound to give the accused the benefit of the literal construction of the words of section 25.

It seems to me that we could not venture to adopt the view of the law contended for by the learned Junior Government Pleader without opening the door to perversion of the intentions of the Legislature.

The petitioner will be discharged from bail.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF OKHIL CHUNDER }
BISWAS } PETITIONER.

1877
July 1

Sections 491, 494, Code of Criminal Procedure—Evidence taken before party concerned—Section 530—Proceeding necessary.

A proceeding under section 530, Code of Criminal Procedure, must be recorded by the Magistrate stating the grounds of his being satisfied of the existence of a dispute regarding land, &c., likely to induce a breach of the peace before he can order a person to be retained in possession thereof.

A Magistrate cannot bind over a person to keep the peace unless he has adjudicated on evidence taken in the presence of that person that a breach of the peace is probable. If such person fails to attend on a summons duly served, a warrant should issue (section 494); the order for security cannot be passed *ex parte*.

THIS was a case referred, under section 296 of the Code of Criminal Procedure, by the Sessions Judge of Chittagong for the orders of the High Court as a Court of Revision.

On the report of a police-officer that a breach of the peace was imminent regarding certain land, the Magistrate issued a summons under section 491 of the Code of Criminal Procedure, and on the non-appearance of the party summoned proceeded to order him to furnish certain security to keep the peace, and he also directed the opposite party to be retained in possession of certain land in dispute until ousted in due course of law.

The judgment of the High Court (1) was delivered by
PRINSEP, J. :—

The order of the Magistrate demanding security to keep the peace from Okhil Chunder, and directing Sarut Chunder to be retained in possession of the disputed land, must be set aside, because it was passed in the absence of Okhil Chunder (see sections 494, 496), and because no proceedings had been taken under section 530, Code of Criminal Procedure.

(1) ROMESH CHUNDER MITTER and PRINSEP, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

1877
April 21.

IN THE MATTER OF KRISHNA MOHUN BYSACK, PETITIONER.

Sections 518, 520, Code of Criminal Procedure—Court of Revision—Judicial Proceedings.

The existence of the circumstances mentioned in Explanation I., is a condition precedent to the action of a Magistrate, under section 518, Code of Criminal Procedure

If the matter is one which cannot properly be dealt with under section 518, it does not fall within that section, and being a judicial proceeding is not protected by section 520 from the action of a Court of Revision under section 297.

THIS was an application to set aside the order of the Magistrate of Dacca, under section 518 of the Code of Criminal Procedure.

For Petitioner. *Baboo Hurry Mohun Chuckerbutty.*

The facts of this case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

MARKBY, J. MARKBY, J. :—

In this case it appears that there has been litigation between certain persons of the name of Bysack, and the present applicant Krishna Mohun Bysack, alleges that he obtained a decree in the Civil Court; to these proceedings it is said that the Magistrate of the District, as Chairman of the Municipality, was a party; but whether, strictly speaking, he was so or not is not material in the present enquiry. Subsequently, on the application of Nund Coomar Bysack and Hurry Mohun Bysack, who appear to have been unsuccessful parties in the litigation, an order was made under section 518 by the Magistrate of the District that Krishna Mohun Bysack, the present applicant, should not proceed with the building of a wall which he had commenced to erect upon the land in dispute, pending further orders. This order appears to have been made without taking any evidence, and without hearing Krishna

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KRISHNA
MOHUN
BYSACK.Judgment.

MARKBY, J.

Mohun Bysack, Krishna Mohun Bysack thereupon put in an application, the object of which was to get rid of that order. The Magistrate refused in any way to modify his previous order, and he also refused to change his order to a proceeding under section 521.

No one appears on the part of the Crown to support the order of the District Magistrate, nor has the District Magistrate sent us any explanation whatever of his proceedings in the matter. It appears that notice of this application, as directed by us, has been served upon the District Magistrate. We cannot, therefore, under these circumstances, do otherwise than assume that the allegations made by the petitioner are correct, though we should be reluctant to think that an officer in the position of Magistrate of a District should have acted in what appears to be so arbitrary and injudicious a manner. At any rate, we have no doubt that the order of the Magistrate was illegal. There is not anywhere in these proceedings the slightest indication that this is a case where any delay which would be occasioned by a resort to less summary proceedings would occasion any serious evil whatever; and we consider that the Magistrate has taken an erroneous view of the law when he says that he must adhere to his order, since he had no power to issue an order under section 521. The Magistrate seems entirely to have forgotten that he has no power at all to take proceedings under section 518 to prevent a nuisance, except in certain special cases which the Act has defined, namely, where immediate action is rendered necessary, and delay is impossible by reason of the existence of the circumstances mentioned in the Explanation appended to section 518. We consider that the existence of the circumstances there stated, showing the necessity of immediate action, is a condition precedent to the Magistrate having power to act under section 518 at all. But there is nothing whatever to shew that such circumstances existed in the present case.

The more difficult question arises whether this is a case in which this Court has power to interfere under Chapter XXII. of the Code of Criminal Procedure. That chapter clearly extends to all judicial proceedings of Magistrates, and by section 4 a judicial proceeding is declared to mean any proceeding in the course of which evidence is or may be taken. Section 518 does not re-

[CRIMINAL.]

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KRISHNA
MOHUN
BYSACKJudgment.

MARKBY, J.

quire the Magistrate to take evidence, but he would no doubt be empowered to do so, and considering that orders made under this section may affect property to an unlimited extent, no one can doubt for a moment that all orders under this section are, as a matter of fact, "judicial proceedings." When, therefore, section 520 declares that orders under that section are not judicial proceedings, it does not make them in reality less so. The object of the Legislature was simply to prevent orders properly made under section 518 becoming the subject of revision by this Court. But it is necessary to confine the operation of section 520 to orders which the Magistrate did make, and was empowered to make, under section 518. It would be most dangerous to allow a Magistrate to disregard altogether the limitation put upon his powers under section 518 by Explanation I., and by assuming to himself to make under that section an order which he has no power to make, to emancipate himself entirely from the control of this Court. We have seen more than one indication of readiness on the part of Magistrates to apply section 518 to purposes for which it was not intended, and we think that this Court, before it allows it to be said that an order made by a Magistrate affecting a man's property is not a judicial proceeding, is bound to see that it belongs to the very exceptional class of cases for which the Legislature has declared that section 518 was intended.

There is a case reported in 22 W. R., 78 (*Chumier Cosmar Roy*, Petitioner), in which it is observed that it is necessary for this Court, in the exercise of its power of superintendence, to see that Magistrates who profess to act under section 518 take care that those conditions under which alone such an order can be legal are fulfilled. We fully agree with that observation, and we only desire to observe, with reference to that case, that we do not think it necessary to resort to the provisions of section 15 of the Charter Act, as was done by those learned Judges in order to do justice in this case. Indeed, we greatly doubt whether any assistance can be derived from that section, for in our opinion the provisions of Chapter XXII. of the Procedure Code are for this purpose as extensive as those of section 15 of the Charter Act. We can, and frequently do, under this Chapter, set aside orders made by Magistrates without jurisdiction.

When this case was argued, there was another case turning upon the construction of section 520, which had been referred to the Full Bench, and we deferred giving judgment accordingly. The judgment of the Full Bench has now been given, but it does not touch the point before us. It merely decides that where the case is, upon the facts found, brought within section 518, there this Court cannot interfere.

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—
Judgment.
—
MARKBY, J.

The ground upon which we base our judgment is this, that it appears that the case is not one which falls under the provisions of section 518, and therefore it does not fall under the provisions of section 520, and not falling under the provisions of section 520, it comes within the definition of judicial proceeding, as given in section 4, and is therefore subject to the same revision as any other judicial proceeding of the Magistrate. We are aware that this is putting a narrow construction upon section 520, but we consider that such a construction of that somewhat peculiar section is both necessary and proper.

Under the powers of revision, therefore, vested in this Court by Chapter XXII. of the Code of Criminal Procedure, we direct that the order made by the Magistrate of Dacca of 1st May, 1876, and any subsequent order directing Krishna Mohun Bysack to abstain from erecting a wall on his own premises, be quashed.

[CRIMINAL APPELLATE JURISDICTION.]

1877

June 29.

July 24.

JAMSHEER SIRDAR AND OTHERS . . . APPELLANTS.

Previous trial of other accused—Right of private defence—How to be pleaded—Section 105, Indian Evidence Act.

A Sessions Judge, holding a second trial, should not comment on the conduct of a previous trial.

It is for those who raise the plea of private defence to prove it. The act charged cannot be denied, and the plea of private defence raised as an alternative. If raised, a full account of the occurrence must be given in evidence.

CRIMINAL Appeals from orders passed by the Sessions Judge of Fureedpore on March, 20th, 1877, convicting the appellants under sections 148, 149 and 304 of the Indian Penal Code.

For the Appellants: *Mr. Arathoon.*

For the Prosecution: *Baboo Jugdanund Mookerjee (Junior Government Pleader).*

The facts of this case, and the points which it is necessary to report, are sufficiently set forth in the judgment of the Court (1) which was delivered by

AINSLIE, J. AINSLIE, J. :—

We have given our best consideration to the able argument of the learned counsel for the appellant, and we cannot but admit that he has succeeded in showing that there is much in the story of the prosecution which is not true, but nevertheless we think we ought not to interfere with the conviction of the prisoners.

It is beyond question that there was a dispute between the naib of the 10-as. zemindar and a large section of the villagers of Binodepore, on the subject of an enhancement of rent claimed, and that for the purpose of enhancing the rent, the naib intended to make a survey of the village. Whether this dispute was complicated by a difference as to the length of the standard pole to

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Judgment

AINSLEE, J

be used in the measurement proposed is a less material point, although the prosecution has put forward this question of the unit of measurement as a leading feature of this case.

It is further beyond question that Nyazoodeen died a violent death; and although the native doctor, who held the *post-mortem* examination of his body, as given evidence, which has been objected to as confused and inconsistent, and which certainly is not of such a clear and precise character as a Court may ordinarily expect from a skilled witness, we are satisfied that the fracture of the skull and injury to the brain described was the result of a blow inflicted during life, and we see no ground for any suspicion that the body was subjected to violence after death for the purpose of making the case appear more serious than it really was.

Again, we can find no reason to disbelieve that part of the evidence which shows that Nyazoodeen interferred to put a stop to the measurements which the naib or his ameen was attempting to carry out, and that he got struck down by Jamsheer, and that the other prisoners were then abetting Jamsheer.

In fact, we were principally pressed to find that the accused were acting in self-defence, and were well within the limits of their right. It was admitted that there is no evidence on the record to establish affirmatively the true state of things at the time Nyazoodeen came by his death, but it was argued that the prosecution had studiously made up a story, surrounded on all sides by false allegations of fact, these false allegations being introduced for the special purpose of making it appear that the accused could not have been acting in self-defence, but were the aggressors, and that if this framework of falsehood could be destroyed, the Court should infer the true state of the case to be precisely the reverse of what the prosecution had sought but failed to establish.

Some of the persons implicated in this offence were brought to trial before a former Judge of the District in March 1876, and on that occasion the process of destructive criticism was successful, and the accused were acquitted in the Sessions Court. On the present occasion the result has been different, and we think the conviction ought to be affirmed. It is not our business to follow the Judge in his comments on his predecessor's judgment. He could not well avoid some review of it in order to explain his

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JAMSHER
SIRDAR AND
OTHERS.*Judgment.*

AINSLIE, J.

reasons for coming to different conclusions, but it was not necessary to set it out at full length in his own with a running commentary thereon. The arguments, which prevailed on the former occasion, were all doubtless pressed upon the Judge at this trial, and might have been fully discussed without formally refuting the earlier judgment of the Court. We cannot also avoid noticing that the present judgment embraces various matters that would have been much better omitted. Comment on the mode in which counsel for the accused at the first trial conducted the examination of witnesses before another Judge and other assessors, though introduced to explain discrepancies in the evidence, might very well have been spared. If the gentleman who appeared at the first trial had conducted his case in a manner that was not justifiable, it is to be presumed that the Judge would have checked him. Obviously the Judge, who was not presiding at the trial, was not the proper authority for the expression of opinion as to the conduct of that trial.

But this much remains certain, that there was a fray between the villagers and the zemindar's people in which the leader of the former came by his death; and we see no reason to doubt that the prisoners were there taking part in it. It is also certain that the cause of the disturbance was a measurement which the zemindar's people wished to carry out. The fact that we really have no reliable evidence of the manner in which the riot began, does not suffice to secure the discharge of the accused. It may possibly be that they were peaceably carrying on the measurement when they were set upon, and that Nyazodeen was killed by one of them in self-defence, but there is no evidence of this. Even if it be admitted that the evidence shows that, before Nyazodeen was struck, he commenced the disturbance by attempting to wrest the measuring rod from the hand of the man who was using it, this is not sufficient for the defence. There can be no doubt that the measuring party was there in considerable force, and that there was an intention to enforce the right to measure by force, or show of force. It may be that the right of the zemindar to measure, which is declared by section 25, Act VIII. of 1869 of the Bengal Council, justified an entry on the land, so that the villagers had no right of private defence as against criminal trespass, but this

would not extend to justify this forcing that right of entry by force, or show of force. Section 37 of the Rent Law provides the remedy where the exercise of the right is opposed.

Even if it were assumed that the right to measure was not being wrongfully enforced, it would be necessary for the prisoners to account satisfactorily for the death of Nyazoodeen. His interference with the measurement and seizing the rod in the polemen's hands, which is admitted by the prosecution, and beyond which the prisoners have failed to prove anything, was no assault to justify the inflicting of death.

It is obvious that, under the provisions of the Evidence Act, section 105, an answer, setting up the right of private defence, must be supported by evidence, giving a full and true account of the transaction from which the charge against an accused person arises. No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases; it must be by proof of the actual facts.

The appeal is dismissed.

1877
JAMSHIEER
SIRDAR AND
OTHERS.
Judgment.
AINSLIE, J.

[CRIMINAL REVISIONAL JURISDICTION.]

1877
June 21.

IN THE MATTER OF TROYLOKHYA NATH } PETITIONERS.
MITTER AND ANOTHER }

Improper discharge—Order for trial—Section 297, Code of Criminal Procedure—Power of High Court.

In considering whether a person has been improperly discharged by a Magistrate, the High Court, under section 297, Code of Criminal Procedure, is not restricted only to an error in law, but can order a trial where *prima facie* the evidence establishes a case against the accused to which he should be required to enter on his defence.

The Sessions Judge was, however, not competent himself to order the trial or inquiry to proceed, but as the order was otherwise a proper order, the High Court in setting it aside revived it as its own order.

THE Deputy Magistrate, before whom complaint of a warrant-case was made against the petitioners, dismissed the case after hearing the evidence for the prosecution.

For Petitioners: *Baboo Rashbehary Ghose*.

On application made to him, the Sessions Judge of Burdwan held that the Deputy Magistrate was not competent at that stage of the case to dismiss it. He further held that *prima facie* a case had been made out against the petitioners under sections 368, 347, 348, 393 of the Indian Penal Code, and he directed inquiry to be made therein.

Baboo Rashbehary Ghose (for Petitioners).—The complaint made did not disclose the commission of a Sessions case, therefore the Sessions Judge was not competent, under section 296 of the Code of Criminal Procedure, to order inquiry to be made into it. Sections 296, 297, read together, show that an order of discharge, based on an examination and disbelief of the witnesses for the prosecution, cannot be set aside by the High Court.

[CRIMINAL.]

C. L. R. 3.

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TROYLO-
KHYANATH
MITTER,
PETITIONER.Judgment.

AINSLIE, J.

The judgment of the High Court⁽¹⁾ was delivered by

AINSLIE, J.:-

A Deputy Magistrate in the present case, having heard the complaint and taken evidence of seven witnesses for the complainant, discharged the accused.

The complainant, thereupon, made an application to the Sessions Judge, who has set out very fully the reasons for which it was proper for the Deputy Magistrate to proceed with the trial. He accordingly directed him to do so.

That order has been brought before this Court by motion under section 297 of the Criminal Procedure Code. With reference to the decision reported at I. L. R., 1 Cal. 282 (Mohesh Mistree, Petitioner) it appears to us that the Judge went beyond his power in making the order. At the same time it is quite clear that the order was a proper one, and under the 1st clause of section 297 this Court has the power to make such order as may seem fit whenever a case is brought to its notice, without reference to the mode in which the knowledge of the case has been acquired. Under the 2nd clause of the section the Court is specifically empowered to direct that any person improperly discharged shall be tried.

It has been contended that this only applies to cases where there has been error in Law, such as a case in which, the facts having been properly found by the Magistrate, the law has been misapplied and the accused erroneously declared not to have committed an offence. The case in 20 W. R., 40 (Debichurn Biswas, Petitioner), was referred to us as in point. It appears to us, however, that that case does not in any way support the contention. That was a case in which the Court declined to interfere, and stated that this Court, as a rule, will not interfere to review the evidence where there had been a regular appeal. We are in no way departing from the practice of the Court not to allow a second appeal on the whole case when we say that the evidence in this case, as set out by the Sessions Judge, shews sufficient grounds for putting the accused person on his defence. Unless the Court exercises the power in cases similar to this, it will be, in the power of any Magistrate to defeat

(1) AINSLIE and McDONNELL, JJ.

the provisions of the new Code of Procedure, by which a power to appeal against an order of acquittal has been given, by discharging instead of acquitting.

Therefore, although we think that the order was wrong in form, we think that it was right in substance. We adopt that order and direct the Deputy Magistrate to proceed in accordance with it, if necessary, taking the evidence of the remaining witnesses named by the prosecutor.

It must be understood that we do not intend to say that the case is completely and conclusively proved, so that the conviction of the accused person ought to follow of necessity. All that we say is, that from what has been said by the Judge there is a sufficient *prima-facie* case to make it necessary to proceed with the trial.

1877
TROYLO-
KHYANATH
MITTER,
PETITIONER.
—
Judgment.
—
AINSLIE, J.

[CRIMINAL REVISIONAL JURISDICTION.]

1877.
July 31.

IN THE MATTER OF RAM SOONDAKEE DEBEE, PETITIONER.

Section 531, Code of Criminal Procedure—Possession—Attachment—Order of Magistrate.

It is only when, after recording a proceeding under section 530, Code of Criminal Procedure, and taking evidence, a Magistrate decides that neither party is in possession or is unable to satisfy himself as to which party is in possession, that he can, under section 531, attach land in dispute. He is not competent summarily to order attachment without such preliminary proceedings.

THIS was an application to the High Court, as a Court of Revision, to set aside the orders of the Magistrate of Bograh passed under section 531 of the Code of Criminal Procedure.

For Petitioner: *Baboo Bycont Nath Dass.*

The facts are sufficiently set forth in the judgments of the High Court (1):—

WHITE, J. :—

We are of opinion that the order of the Magistrate in this case must be set aside. It is an order directing that certain land should be attached "until such time as the Civil Court shall issue clear orders as to possession of the same." It purports to be made under section 531 of the Criminal procedure Code, which allows a Magistrate, when he is unable to satisfy himself as to who is the party in possession of land, to attach it until a competent Civil Court determines the rights of the parties. The Magistrate has made his order without holding any enquiry or taking any evidence, or recording any proceeding as to who is the party that is in possession of the land, and without deciding upon any evidence that was before him that the fact of actual possession was incapable of determination. It appears that, as far back as 1866, the present applicant was, by an order of a Magistrate's Court, put in posses-

sion of this identical land, pending the result of proceedings taken against her by Brojendronath and others, in a Civil Court for the establishment of their title. It also appears that a suit has been brought by Brojendronath and others to establish their title, in which they have succeeded in establishing their title to a portion of the land, while, as regards the remainder of the land, the applicant Ram Soondaree has been declared by the Court to be entitled to retain possession. Brojendronath, however, has not yet obtained execution of his decree. In the meantime quarrels have arisen between the ryots of the respective parties, and one of these quarrels came before the Magistrate of Bograh in the shape of a charge of criminal trespass brought by a ryot of Brojendronath against a ryot of Ram Soondaree in respect of a small bit of land included in the order of 1866. The Magistrate of Bograh, who tried the charge, decided incidentally in the course of hearing it that this small piece of land was in the possession of the ryot of Brojendronath. But, on an appeal preferred against the conviction, the Judge came to a contrary conclusion, and reversed the conviction. It would appear that the difference of opinion between the Magistrate and the Judge as to the party in possession of this small bit of land, is the only reason why the Magistrate in the present case has made the order that he has done under section 531. Now, even assuming that no order had been passed giving possession to the applicant in 1866, it was the duty of the Magistrate, before he passed the present order attaching the property, to enter into the question as to who was or was not in possession of the land, to take evidence on the point, and to record a proceeding thereon. It was only when he was unable to determine the fact of actual possession that he was competent under section 531 to attach the land. On the other hand, taking it that possession of the land was in 1866 awarded to the applicant, it is clear that she is entitled to retain possession of it until ousted by law, and the only facts that could give the Magistrate jurisdiction to entertain an application under section 530, would be if it were shown that the applicant had lost possession of the land, and the same had come into the possession of other parties, and a new dispute had arisen as to the fact of actual possession. Therefore, in either view of the case—whether an order was, as we understand it, made in

1877

RAM SOON-
DAREE DEBEE,
PETITIONER.

—
Judgment.

—
WHITE, J.

1877 1866 in favour of the applicant, or not—it is clear to us that
 RAM SOON- the order, which the Magistrate has now made under section 531, is
 DAREE DEBEE, erroneous, and one which he ought not to have made, and it must
 PETITIONER. therefore be set aside.

Judgment.

MITTER, J. :—

I am also of opinion that the order of the Magistrate in this case, attaching the disputed property under section 531, should be set aside.

It appears that a Police-officer made a report to the Magistrate stating that there was a likelihood of a breach of the peace between the parties to this proceeding. Upon that the Magistrate recorded a proceeding, stating that he was satisfied that there was a likelihood of a breach of the peace, and called upon the parties to put in their respective written statements, and to show cause why the property should not be attached. In pursuance of this order, notice was issued to the parties, and they put in their written statements. The Magistrate, without recording any evidence upon the question of possession, at once passed an order under section 531, attaching the property in dispute. I entirely agree with my learned colleague that this the Magistrate was not competent to do. He could pass an order like this only, if, after recording the evidence upon the question of possession, he was of opinion that he was unable to satisfy himself as to which person was in possession of the subject of dispute, or that his decision on the question of possession was that neither party was in possession. It is clear, therefore, that the proceedings of the Magistrate have not been in accordance with the provisions of the Criminal Procedure Code. We must, therefore, set aside the order complained of.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF MUSSUMAT JAMOTI. PETITIONER;

1877
August 2.

AND

GADALO KAMAR OPPOSITE PARTY.

Section 536, Code of Criminal Procedure—Maintenance of child—Reopening of case decided.

When a duly-empowered Magistrate has decided a matter under section 536, Code of Criminal Procedure, by dismissing the application after hearing the evidence offered, the District Magistrate is not competent to entertain the complaint *de novo*.

THIS case was submitted to the High Court, as a Court of Revision, by the Sessions Judge of the Assam Valley Districts for the reversal of an order under section 536, Code of Criminal Procedure, passed by the Deputy Commissioner (Magistrate) of Goalpara, directing Gadalo Kamar to pay one rupee per month for the maintenance of a child born to him by the petitioner Mussumat Jamoti:

The facts of this case appear from the order of the Sessions Judge in submitting it to the High Court:—

Mussumat Jamoti sued one Gadalo for maintenance of herself and child under section 536 of the Code of Criminal Procedure. This case was originally instituted in the Court of the Extra Assistant Commissioner of Goalpara, an officer with the powers of a Magistrate of the 1st class. The records of this case are also herewith sent.

Gadalo's defence was that Jamoti was not his wife, and that he was not the father of the child.

The Extra Assistant Commissioner, after going fully into the case, dismissed Jamoti's petition on the 15th May, last.

On the 8th June Jamoti put in a petition before the Deputy Commissioner, asking *him* to decide her claim for maintenance. She referred the Deputy Commissioner to the previous proceedings before the Extra Assistant Commissioner, and requested him to send for the records of that case and decide upon her

1877
 MUSSUMAT
 JAMOTI
 v.
 GADALO
 KAMAR.
 Judgment.

claim. This petition to the Deputy Commissioner was, in fact, an appeal against the Extra Assistant Commissioner's order dismissing the petitioner's claim.

The Deputy Commissioner thereupon took up the case, heard the petitioner's witnesses, and gave her an order for maintenance of her child, being of opinion that the Extra Assistant Commissioner had overlooked the question as to whether the defendant was the father of the child, and had decided only the question whether she was the wife of defendant.

The following judgment of the High Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

We entirely concur with the Judge.

It is clear that the Extra Assistant Commissioner, who first heard the woman's complaint, went fully into the question of the paternity of the child—indeed, that was the principal question to which he addressed himself.

Even if this had not been so, the complainant's remedy would have been by application to a superior Court.

The Deputy Commissioner had no jurisdiction to entertain the complaint *de novo*, and his order is quashed.

• (1) JACKSON and McDONELL, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

DWARKANATH, BHUTTACHARJEA AND } APPELLANTS.
 OTHERS }

1877
 Dec. 14.

Section 296, Code of Criminal Procedure—Notice to party accused—Order directing commitment.

Before a Court of Session can, under section 296, Code of Criminal Procedure, direct a Magistrate to commit the accused in a "Sessions case" which has been improperly dismissed under section 147, it is bound to give the accused person notice of the application for such an order, so that he may show cause why it should not be passed. *Bundhoo*, 22 W. R., 67; *Nowab*, 24 W. R., 70, followed.

APPEAL from the order of the Sessions Judge of Rungpore, convicting and sentencing the appellants under section 330 of the Indian Penal Code.

The points taken by the Appellants are sufficiently stated in the judgment of the High Court (1), which was delivered by

KEMP, J.:—

KEMP, J.

These parties have been convicted under section 330 of the Penal Code by the Sessions Judge of Rungpore, and have been sentenced to various terms of imprisonment. The objection taken by the learned Counsel, Mr. Ghose, who appears for the appellants, is that the direction of the Judge for the committal of the prisoners under section 330 of the Penal Code, was without jurisdiction, and that the committal and trial ought to be quashed.

The original complaint was made of offences under sections 323, 342 and 383, the last being the section defining the offence punishable under section 384. The complainants were examined, and the case was made over for trial to the Deputy Magistrate, Mr. Rattray. Mr. Rattray recorded evidence in the case, and expressed a very decided opinion that the case was a false case, and that the evidence, to use his own language, was fabricated. He dismissed

(1) KEMP and MORRIS, J.J.

1877

DWARKA-
NATH BHUT-
TACHARJEA
AND OTHERS.

Judgment.
(C)

KEMP, J.

the case under section 147, Criminal Procedure Code. Upon this, one of the complainants, named Fool Nushyo, petitioned the Judge who was holding the Sessions at Bograh on circuit, and the Judge, without giving notice to the parties who were accused, directed the Deputy Magistrate to commit the accused for trial under section 330. The Judge, in his order directing this committal, observes that the case is a Sessions case, and had not been sufficiently inquired into. Now, the complaint has been dismissed under section 147 of the Code of Criminal Procedure; and, although under that section the dismissal of a complaint does not prevent subsequent proceedings, it has been held by this Court, in decisions to be found in Vols. XXII. and XXIV., of the Weekly Reporter, pages 67 of Vol. XXII. and 70 of Vol. XXIV., that before a Sessions Court can direct the committal of a party against whom a complaint has been dismissed by the Magistrate, that Court is bound to give him notice of the application for such committal, and an opportunity of showing cause why the committal should not be made. That course of procedure has not been followed in the present case; and further, if the Judge was of opinion that the case had been dismissed without sufficient enquiry, he ought to have proceeded under section 298, which directs that, if the Court of Session is of opinion that a further inquiry should be made into a case which has been dismissed under section 147, it may direct the Magistrate, or any other officer subordinate to the Magistrate, to make such further enquiry into the complaint which has been so dismissed.

We think, therefore, that the order of the Judge directing the committal of the petitioners is bad in law and without jurisdiction. We, therefore, quash the proceeding, set aside the sentence, and direct that the prisoners be released.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF DEDAR BAKSH AND } PETITIONERS.
 HALAL CHOR. }

1877
 May 10.
 June 19.

Security for good behaviour—Section 509, Code of Criminal Procedure—Mode of fixing the amount.

The amount of the security to be furnished for good behaviour should be such as to afford the person a fair chance of complying with the order, so as not to make the alternative imprisonment unavoidable. Such imprisonment is not as a punishment for a crime committed, but as a protection to society against the perpetration of a crime by the individual on his failing to furnish other security. When the amount of security required is *prima facie* unreasonable, the High Court can call upon the Magistrate to certify the grounds for fixing that amount.

4 Mad. xlvj., *App.*, approved and followed.

THE petitioners were ordered under section 505, Code of Criminal Procedure, by the Magistrate of Dinagapore to furnish security for their good behaviour—the first petitioner in two respectable and sufficient “securities in the sum of five thousand rupees a piece”, the second petitioner in “two respectable and substantial securities in the sum of one thousand rupees each”, and it was further ordered that “in default, either of them be rigorously imprisoned for one year.”

For Petitioner: *Baboo Judoonath Banerjee.*

For Govt.: *Baboo Jugdanund Mookerjee (Junior Govt. Pleader).*

On application to the High Court, as a Court of Revision, to set aside these orders as illegal and unreasonable, and on perusal of the record, the following order was passed by

PRINSEP, J. (MARKBY, J., concurring):—

PRINSEP J

Objection is made to these orders on the ground that the amounts fixed are excessive and unreasonable, and more than these persons can be expected to furnish.

We have no means of learning the grounds on which the Magistrate fixed those amounts, but *prima facie*, they do appear to be

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DUDAR
BAKSH AND
HALAL CHOR.

June 19.

more than persons in the position of the petitioners can be reasonably expected to furnish, and we therefore desire that the Magistrate do state the grounds or information on which he so acted.

On receipt of the Magistrate's reply the High Court (AINSLIE and McDONELL, JJ.) delivered the following judgment:—

We think that, under the circumstances stated by the Magistrate, it is not desirable that this Court should interfere in the present case.

In the fourth paragraph of his letter the Magistrate expresses a doubt whether the High Court is competent to call upon him to state the grounds upon which he fixed the amount of security. With reference to this we desire to call his attention to a ruling of the Madras High Court (1) at page 450 of Mr. Prinsep's edition of the Code of Criminal Procedure, an expression of opinion in which we entirely concur. It is there said, "The imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as punishment for a crime committed, and being made conditional on default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required condition of security." If the Magistrate had declined to furnish a statement of the grounds upon which he fixed the amount of security, this Court would have been unable to say that he had fixed it on just and reasonable grounds, and probably the result would have been that we should have felt bound to modify the order as *prima facie* unreasonable and unsupported by anything before us.

(1) 4 Mād. xlvii., App.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF KOOKOR SINGH PETITIONER.

1877
Aug. 6.*Code of Criminal Procedure, section 505—Bad livelihood—Charge—Notice of precise matter proved—Witnesses—Bail.*

A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion.

He should be asked to produce his witnesses or offered assistance to procure their attendance.

He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal.

THIS was an application to the High Court, as a Court of Revision, to set aside an order of the Magistrate of Dinagopore, requiring the petitioner to give security for good behaviour under section 505 of the Code of Criminal Procedure.

The facts of this case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

JACKSON, J. :—

JACKSON, J.

We have considered the Magistrate's further proceedings in the case of Kookor Singh, charged under section 505, Code of Criminal Procedure.

It appears that, on receipt of the orders of the Division Court quashing the previous decision in his case, Kookor, being released, was immediately re-arrested and placed on bail by the Joint Magistrate on the 18th May.

The Magistrate ordered on the 21st that the case should be heard on the following day, and accordingly on the 22nd the accused was further examined.

The questions put to him were: Whether he had witnesses touching the charge against him, to which he answered that he had.

(1) JACKSON and McDONELL, JJ.

1877

KOOKOR
SINGH.Judgment.

JACKSON, J.

Whether he had anything to answer as to the suspicion against him to which he answered that he was at enmity with the Darogah and with Jaynarain. What quarrel he had with the Darogah? *Answer*: That quarrel related to his demand of the price of some articles of food supplied, which price the Darogah had not paid. Whether his witnesses were in attendance? *Answer*: They are not. Why he had not brought them? *Answer*: They will not come at my request. Whether he had applied for *tulub* (meaning the Magistrate's process) on them? *Answer*: No. Whether he had filed a nominal roll (*ismnavisi*) of them? *Answer*: No. Whether he had any objection to give security? *Answer*: My quarrel with the Darogah. Whose ryot he was? *Answer*: Names his landlord.

The order (of same date) on this is that the accused do remain in *hajut* (lock-up) till 4th June.

A note in the English language, signed by the Magistrate, no doubt, says that Kookor Singh is remanded "for such evidence as he can bring"; but there is nothing to show that he (Kookor) was made aware of the Magistrate's object or intention in making the order.

Manifestly he was neither asked who his witnesses were, nor whether he now desired the assistance of the Court, though he had already stated that the witnesses would not attend without process. On the day appointed, a pleader appeared on the prisoner's behalf, and tendered a list of 16 witnesses for the defence; but the Magistrate, observing that the case had stood over long enough, refused to allow any further adjournment, and overruling certain objections advanced by the pleader, made the order now complained of.

Taking this order by itself, *i.e.*, without reference to former proceedings in the case, it appears to us open to the following serious objections:—

1. The accused has really no notice of the precise charge or which he is brought before the Magistrate. He is entitled unquestionably to have the precise matter, which the Magistrate considers established by the evidence against him, embodied in a charge. It is not sufficient to say generally that there is suspicion.

2. The accused was, by the Magistrate's procedure, absolutely deprived of the means of defending himself. He was not told, that he was to produce his witnesses, or offered assistance in procuring their attendance, or even asked who they were; and, when he made application by a pleader, his request was refused on the ground that it was made too late, although he had not been warned to make it before.

3. The accused was, without authority of law, put in *hajat* or close custody, pending the final hearing. The Magistrate justifies this on the ground that the charge is cognizable by the police. This is no more decisive of the question than is the rule in section 515 that the evidence is to be taken as in summons cases. The Magistrate is not competent to refuse bail unless the law expressly sanctions the refusal, and it is clear that, when the Magistrate, by his final order in the case, has no power to commit the accused to prison except in case of his failure to give bail, he cannot do so, except in the like case pending enquiry.

The illegal order thus made was calculated, and has the appearance of being intended, to cripple the accused as to his defence.

It is manifest, therefore, that the petitioner has not had a fair trial, and he is entitled to have the order quashed. These irregularities, however, assume a still more serious character when considered with what had taken place before in the case of the petitioner.

It appears that a previous order of the same Magistrate, based on the very same evidence and enquiry, had been set aside by an order of this Court on the ground set out in the Judge's letter or memo. of 12th July.

It might have been expected, therefore, that, in dealing further with the case, the Magistrate would have been specially careful to avoid the errors pointed out by the Division Bench.

Instead of this, the errors are repeated with an additional illegality; and the proceedings unfortunately show not the slightest trace of a desire to afford the accused those advantages to which every person on his trial is entitled.

It is right to add that we are not favourably impressed by the evidence on which the Magistrate based his order, and consequently

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KOOKOR
SINGH.

Judgment.

JACKSON, J.

1877

KOOKOR
SINGH.*Judgment.*

JACKSON, J.

we see no reason to think that the release of Kookor Singh will lead to a failure of justice.

Magistrates, who act in the manner exemplified in this case, ought to bear in mind that they not only violate their duty as judicial officers bound to do justice indifferently, but even contravene their own object, as administrative officers, by rendering the supposed offenders objects of sympathy, as well as by ensuring their escape, at any rate for the moment. The order is quashed.

[CRIMINAL REVISIONAL JURISDICTION.]

IN RE RAM CHUNDER LALLA PETITIONER.

1877
Aug. 30.*Recognizance—Forfeiture.*

When a Magistrate has before him the fact that a person convicted by him of an offence attended with violence was under recognizance to keep the peace, and does not nevertheless proceed to forfeit such recognizance, it must be held that he thought it unnecessary to do so. Proceedings taken after the lapse of a considerable period are bad and contrary to the intention of the law.

For Petitioner : *Babu Umbica Churn Bose.*

THE facts of this case are set forth in the judgment of the High Court (1), which was delivered by

AINSLIE, J. :—

AINSLIE, J

In this case it appears that, on the 1st of November, 1875, an order was made on the prosecution of one Roy Kanto Seal, requiring the petitioner to execute a security-bond for a thousand rupees for the period of one year. Subsequently, the petitioner was charged before the Deputy Magistrate of Mohesrakha, by Goburdhun, Manna and Petumbur Bagdi, with the offence of hurt. On the 30th of May, 1876 he was convicted and sentenced to pay a fine of twenty rupees.

On the 8th of November, 1876, that is, after the expiration of the period for which the recognizance was taken, the Deputy Magistrate, at the instance of Roy Kanto Seal, made an order, calling on the petitioner to show cause why he should not pay the penalty of a thousand rupees on account of the conviction in May, and subsequently, on the 30th of April, 1877, he ordered the petitioner to pay that amount.

Now, it appears to us that the proceedings of the Deputy Magistrate in the case are bad. The object of the bond was to ensure the keeping of the peace for the period specified in it, that is, for one year. Had the petitioner been called upon within that

(1) AINSLIE and McDONELL, J.J.

1877

RAM
Chunder
LALLA.

Judgment.

AINSLIE, J.

period to pay the penalty, it might very well be said that this was done with the view of carrying out the original intention of securing the maintenance of peace for a limited term; but, after the expiry of that term, the only object of enforcing the order can have been by way of fine as punishment for what had been done before the expiry of the year. In April, 1876, when the prosecution by Goburdhun and Petumbur was before the Deputy Magistrate, he had on record the recognizance of the petitioner. It was open to him at that time to pass such order, as might seem necessary under the circumstances, for the purpose of punishing and deterring the accused from the commission of any further breach of the peace within the year. If he did not then choose to proceed upon the recognizance, we must take it that he thought that the order directing a fine of twenty rupees was sufficient for all purposes.

Where a Magistrate has taken recognizance from any person, and that person is brought before him within the period covered by the recognizance, he ought, at the time of making an order in respect of the offence alleged on the second prosecution, to take into consideration the fact that there is an outstanding recognizance, and to determine once for all whether he will proceed upon it or not.

When the Deputy Magistrate, in this case, abstained from making any order for forfeiture of the recognizance of the petitioner, it must be taken that he determined not to proceed upon it for that particular instance of breach of the peace.

This being so, it is not open to him to reconsider and add to his order. It is quite clear that in the present instance the exaction of such a penalty as a thousand rupees is wholly unnecessary for the purpose of preventing a breach of the peace; and that the proceedings now taken have been set on foot to gratify vindictive feelings on the part of Roy Kanto Seal.

We think that the order of the Deputy Magistrate must be quashed.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF BUNWARI LALL, MIS-
SER AND OTHERS PETITIONERS;

1877
Aug 30.

AND

RAJA RADHA PERSHAD SINGH . . . OPPOSITE PARTY.

Section 530, Code of Criminal Procedure—Order of Magistrate—Limited possession.

A Magistrate cannot, under section 530, Code of Criminal Procedure, order that a person be kept in possession until he has reaped the crop standing on the ground, and then that he shall give way to another. When there have been long pending disputes in the Courts, he should determine who was in peaceable possession when they commenced.

THIS was an application made to the High Court, as a Court of Revision, to set aside an order under section 530, Code of Criminal Procedure, passed by the Magistrate of Buxar, a division of the District of Shahabad.

For Petitioners : *Mr. R. E. Twidale.*

For Opposite Party : *Baboo Jugdanuna Moorerjee. and Baboo Chunder Madhub Ghose.*

The facts are sufficiently set forth in the judgment of the High Court (1), which was delivered by

AINSLIE, J :—

AINSLIE, J

There has been a dispute between the Maharajah or Dooarraon and the ryots of certain villages in respect of lands described in the judgment of the Sub-divisional Officer of Buxar as Umarpore Dearah.

On the 30th of November, 1876, the then Assistant Magistrate* made an order, by which he declared that he had found the Maharajah in possession of 150 bighas, and the cultivators to be in possession of the remainder, the total quantity of land in dispute

(1) AINSLEE and McDONELL, JJ.

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being about 800 bighas. There are no boundaries given, and no means of ascertaining to what this order applies.

The case appears to have been sent up to this Court by the Magistrate of the District; and on the 3th of April, 1877, a Division Bench quashed the order on the ground that, as the lands to which it relates are not specified or identified, it must be inoperative.

Thereupon fresh proceedings were taken, and the Sub-divisional Officer, on the 25th of May, 1877, made another order, which is the subject of the present motion. He sets out by saying that the case is one for possession of crops standing on about 800 bighas of land, and for possession of the land. He then states that "the Maharajah is admittedly the proprietor of the disputed land, and further claims to have made the land his *zerat*." He goes on to show how these proceedings originated. He says that they arose out of the petition of one Shonarut Tewary, a servant of the Maharajah, which set out that the ryots of Keshopore and Badkagon were obstructing him in cultivation. This was on the 9th of October, 1876.

Thereupon followed the enquiry and order by the former Sub-divisional Officer, the result of which was to show that 650 bighas out of the 800 bighas were in actual possession of the ryots.

Further on in the judgment he says it is evident that, since October, at all events, the Maharajah through his servant entered upon the land, and asserted his title to possession, erected a shed for the use of his servant, and placed some 15 or 20 *peadahs* upon the Dearah; and "this", he says, "is certainly evidence in favour of Shonarut Tewary having succeeded in sowing the *rubbee* crop. Another thing in favour of this is, that some police were stationed in the village to prevent a breach of the peace, and there is no doubt that they have all along shown a tendency to side with the Maharajah's servant in the case." If that indicates anything, one would suppose that it indicates that the Maharajah's servant was trying, with the assistance of the police, to force the ryots out of the cultivation of the land.

The Assistant Magistrate then goes on to say: "The Maharajah claims possession previously to this, and his witnesses state that the lands have been in *zerat* since Assar before last, or for two years.

The Missers, however, can produce real receipts, which are genuine ones, for the year 1874, and up to the month of Agrahn, 1283, corresponding to December, 1875; so that the claim of the Maharajah is simply false, and the Assistant Magistrate says this distinctly. His language is: "I believe that the Missers were in possession of the lands up to December, 1875; and therefore, in all probability, cut and carried the *rubbee* crop in March and April, 1876; and, further, I am inclined to believe that they made the first sowings that year, for it is reasonable to suppose, from the course events have taken, that they would not have relinquished the land peaceably and without resistance." Therefore, upon the Magistrate's own finding, up to the period that Shonarut Tewary came in and sought his assistance, the ryots were in peaceable possession of the land; and the very fact that he came in and sought assistance from the Magistrate, and apparently has been maintained in possession, by the help of the police, seems to show that the Maharajah was not in peaceable possession at the time that these proceedings commenced.

The Assistant Magistrate goes on to say: "The first sign of anything of this sort occurring was when Shonarut Tewary complained in October; and this, in my opinion, was the first time the Maharajah really attempted to possess himself of the land, at all events with any success." He then goes into a question which he admits has very little to do with the matter under notice, namely, the question of the legal title of the ryots; and he finds that they had no *guzashta* rights. On that finding it is not necessary for us to make any comment; but he says: "It is satisfactorily proved, by the evidence of some respectable stud cultivators, that the Government stud authorities occupied the lands as tenants from Hurhi Baboos, and did what they pleased with it in the cultivation of oats or other corn. It is further proved, by the evidence of Resal Rai, Gopee Rai and Ajoodhya Rai, that, after the stud authorities relinquished the land, it was held on a lease by Gopee Rai and Resal Rai, and cultivated partly as *serat* and partly by tenants-at-will." The words tenants-at-will are used clearly in contradistinction to the term *guzashtadars*; but whether the Missers were in possession as tenants-at-will or *guzashtadars* is wholly immaterial for the purposes of this case, because the only

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question here is, whether they were in possession at all; and, if in possession, whether that possession had or had not been terminated in a legal manner.

The Assistant Magistrate further says: "Out of the crops at present stated to be standing on the ground, the *rahar* and *kapass* (cotton) were sown in Assar last. For the reason mentioned above; I believe that in that month of the year, the lands were in possession of the Missers, and that the crops were sown by them. Therefore, although the land is now in the possession of the Maharajah, I think it is equitable, as well as legally right, to give possession of these crops to the persons who sowed them." And he goes on to make an order in these words: "I, therefore, under section 530 of the Criminal Procedure Code, order (I suppose the Magistrate means 'declare') that Bunwaree Missar and others are in possession of the *rahar*, *kapass* (cotton), and *raree* (castor-oil), crops at present standing on the Umarpore Dearah, and are entitled to take and retain possession till ousted in due course of law by cutting and carrying away the same; and I forbid all disturbance of possession until such time, and I order that the Maharajah Radha Pershad Singh of Doonraon, is in possession of all other crops whatever at present standing on the said Umarpore Dearah lands, and that he is in possession of the Umarpore Dearah lands, and is entitled to retain possession till ousted in due course of law."

Now, the Magistrate has found that the ryots were in possession; that they sowed the crops; that they are so far still in possession; that they are entitled to reap the crops; and that they are not to be disturbed until they do reap them: and he has not found that their occupancy had been legally terminated. It seems to us that this is a finding, that at the time these proceedings commenced, the ryots were the persons in actual and peaceable enjoyment of the land bearing these crops, and that interferences with them, so far as it had gone, had been by one who had never acquired peaceable possession of the land.

How the two parts of the order are to be reconciled, we fail to understand. We take it that it is not the intention of section 530 of the Criminal Procedure Code to give a Magistrate power to declare that a person should have possession up

to a certain period not yet arrived. He has simply to see whether or not he is in possession and entitled to retain it; if so, his possession may be terminated by due course of law, but not by the order of a Magistrate.

Therefore, so far as the land bearing the *rahar*, *kapass* and *raree* crops are concerned, the two parts of the order of the Magistrate are inconsistent and contradictory, and must be set aside. It also becomes necessary to set aside the whole order, because there is on the record nothing which enables us now to declare the extent and position of the particular lands which bear the remaining crops.

If any further proceedings have to be taken in this case we trust that the Magistrate will bear in mind that the question which he has to consider is, who is the person who has peaceable possession? If contention has been going on from the date of the institution of proceedings in the Court up to the present hour, he must go back and see who was the person who had peaceable possession at the time that these proceedings were first instituted. If a person has been turned out of possession and submits to the ouster, and the other party, whether rightly or wrongly, is in peaceable possession, a Magistrate will not go behind the period where possession may be found to have become peaceable; but the mere fact of seizure and occupation, while complaints are being made to the police, and proceedings are being held in the Criminal Court, cannot be said to be such peaceable possession as the Magistrate is bound to look to and maintain. A man cannot give himself a title to the aid of the Magistrate by his own wrong-doing, except so far as it can be said to have been acquiesced in, and thus to have for the time gained for him the position of a peaceable occupant.

We quash the order of the Magistrate, and direct that the proceedings be returned.

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[CRIMINAL REVISIONAL JURISDICTION.]

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Sept. 6.IN THE MATTER OF GOPINATH SHAHA }
AND ANOTHER } CONVICTS.*Homicide—Grievous hurt—Discretion of Magistrate—Commitment
ordered—Conviction set aside.*

Where death has resulted from a violent attack, the Magistrate is bound to commit to the Court of Session, on a charge of culpable homicide not amounting to murder. Conviction of grievous hurt is contrary to law.

THIS case was submitted to the High Court, as a Court of Revision, by the Sessions Judge of Jessore, that the orders of conviction and sentence passed by the Magistrate on Gopinath Shaha and Gungadhur Shaha might be set aside as contrary to law, and an order passed directing the Magistrate to commit those persons to be tried by the Court of Session.

The facts of this case are set forth in the following statement submitted by the Sessions Judge to the High Court:—

“Two persons, named Gopinath Shaha and Gungadhur Shaha have been convicted by the Assistant Magistrate of Magoorah under section 325, Indian Penal Code, and have been sentenced, on the 27th July, the former to six months, and the latter to one month's rigorous imprisonment. The term of the latter prisoner has now expired. An application which accompanies has been made by Udhoy Chund Shaha, brother of Hurish Chundar Shaha, deceased.

“I am of opinion that the order of the Lower Court was bad in law, and that it ought to be reversed. The native doctor who examined the body has deposed that, ‘from the appearance of the body, death was, in my opinion, caused by rupture of the spleen. The spleen must have been ruptured by violence, and I think the violence must have been very great. The spleen was not sufficiently enlarged to be easily ruptured in any way,’ &c.

• “There is also evidence which, if true, points to the two accused using violence to the deceased, and to his being trod upon, struck and kicked, and to his dying shortly afterwards.

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"The witness, Udhoi Chund, brother of the deceased, speaks to a quarrel existing between his brother and the two accused for about two years, &c. The Assistant Magistrate has stated that 'the evidence proving the assault is very clear and distinct', and that he sees 'no reason for disbelieving it', and finds that Huree Shaha died in consequence of rupture of the spleen caused by the blows. In my opinion the aspect of this case is of a serious nature, and should not have been treated as one of grievous hurt, and disposed off by such inadequate sentences as the Assistant Magistrate has thought proper to inflict. The police sent up the case in A. form under sections 302 and 304, and I do not see that they were wrong in doing so. This is not a case of spleen rupture from a hasty blow, but spleen rupture and death resulting after an attack, and that of a violent nature, made upon him, and no provocation given at the time by the deceased is apparent."

The following judgment of the High Court(1) was delivered by

PRINSEP, J. :—

PRINSEP, J.

On the facts found by the Assistant Magistrate, this is clearly a case that he should have committed to the Court of Session on a charge of culpable homicide not amounting to murder. We therefore annul the convictions and sentences passed on Gopinath Shaha and Gungadhur Shaha, and direct that the Assistant Magistrate do commit them to be tried by the Court of Session. A warrant should be issued at once for the arrest of Gungadhur Shaha.

(1) MARKBY and Prinsep, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

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Sept. 13.

OUDH BEHARI NARAIN SINGH . . . APPELLANT.

Local enquiry without notice—Proceedings by Sessions Judge after opinion of Assessors.

If a Sessions Judge should think it necessary to visit the place of the alleged occurrence of an offence under trial, he should give notice to the parties and the Assessors. He should not go without such notice, and after the trial has been completed by delivery of the opinion of the Assessors.

For Appellant: *Braxson and Evans.*

For Government: *Piffard.*

APPEAL from a capital sentence passed by the Sessions Judge of Tirhoot.

It is necessary to report only a portion of the judgment of the Court (1) in the case, which was delivered by

PRINSEP, J. PRINSEP, J. (MARKBY, J., concurring) :—

The boy Juggooa has given evidence which is of little value, and, looking at his tender years, it does not seem to us to be the evidence of a reliable witness. The Sessions Judge, however, especially relies on this witness, because, when he visited the prisoner's house after the trial had been completed and the Assessors had delivered their opinions, but before he had delivered judgment, the boy "acted his evidence" when called upon to do so. At that time neither the Assessors, who with the Sessions Judge composed the Court at the trial, nor the prisoner, nor the Counsel or other representative of either side, were present. We consider this procedure of the Sessions Judge to be most ill-advised, and to be altogether without any authority. The result of this "acting", is certainly not receivable as evidence. We also are of opinion that, if, in a Sessions trial, the Judge should think it necessary or desirable to visit the place of the alleged occurrence, he should give due notice to the parties, and should proceed thither with the Assessors, and not after the close of the case.

(1) MARKBY and PRINSEP, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

[FULL BENCH.]

BURA HANGSEH AND BOOK SINGH. APPELLANTS;

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THE QUEEN RESPONDENT.

*Legislative Councils, Powers of—Absolute and limited—Delegation—
Act XXII. of 1869.*

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Mar. 26.

Statement.

Held, per CURIAM:—The High Court is competent and bound to determine whether the Legislature, in passing an Act, has acted within its legitimate powers.

The Governor-General in Council could, in the exercise of his legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

Per JACKSON, AINSLIE, MARKBY and KEMP, JJ. (GARTH, C. J., MACPHERSON and PONTIFEX, JJ., dissenting):—The notification of the Lieutenant-Governor, issued under authority of Act XXII. of 1869, section 9, could not have the effect of putting an end to the jurisdiction of the High Court in the Cossyah and Jynteeah Hills; that jurisdiction is now the same as it was before the notification was issued by the Lieutenant-Governor.

Per GARTH, C. J., MACPHERSON and PONTIFEX, JJ., contra:—Act XXII. of 1869 was a law which the Legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

Per GARTH, C. J.:—The view which the Judges took of the powers of the Indian Legislature in the case of *Biddle vs. Tarriny Churn Banerjee* (Taylor and Bell 391, 477) has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833.

The Queen vs. Meares, 22 W. R., 54; 14 B. L. R., 106; and in the matter of *Feda Hossein*, 1. L. R., 1 Cal. 431, referred to.

CRIMINAL APPEAL from an order passed by the Deputy Commissioner of Shillong convicting the appellants, and sentencing them to death on a charge of murder.

In this case the appellants were indicted before the Deputy Commissioner of Shillong for the wilful murder of one Kana Lalong. The charge is as follows: "That you, Book Sing and Bura Hangseh, on or about the 13th of November, 1875, near Yeo Thymai, in the jurisdiction of the Jynteeah Hills, intentionally caused the

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death of one Kana Lalong, and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of this Court under Chapter III., Rule 17, of the Cossyah Hill Code." The prisoners were found guilty and sentenced to death by the Deputy Commissioner, on the 20th of April, 1876: this sentence was commuted to transportation for life by the Chief Commissioner, on the 23rd of April, 1876.

The prisoners appealed to the High Court on the 9th of July, 1876, and the question then arose whether an appeal lay. The case was argued before a Division Bench by the Legal Remembrancer (Mr. Bell) on behalf of the Government of Bengal, and was referred to a Full Bench, where it was again argued, at the instance of the Government of India, on the 30th of January, 2nd, 5th and 7th of February, 1877.

The main question was: Whether a notification of the Lieutenant-Governor of Bengal, issued under the authority of Act XXII. of 1869, section 9, had the effect of putting an end to the jurisdiction of the High Court in the Cossyah and Jynteeah Hills?

The historical position of this district is shown in the judgment of Mr. Justice MARKBY.

Paul (Advocate-General) and *Kennedy* (Standing Counsel) for the Government.

This Court has no jurisdiction to entertain the appeal. The 9th section of the High Courts Act, 24 and 25 Vic., c. 104, gives to the Governor-General of India in Council the power of abolishing the jurisdiction of the High Court in any district whatever, and this is what has been done by section 3, Act XXII. of 1869, which repeals Act VI. of 1835. It was that Act, and that Act alone, which gave jurisdiction over the Cossyah Hills to the Nizamut Adawlut. To this jurisdiction the High Court succeeded; and the repeal of the Act which gave it has taken it away, and restored the state of things which previously existed.

Even if it be considered that section 3, Act XXII. of 1869, has not taken away the jurisdiction of the High Court, the Act, as a whole, clearly does so. It evinces the final determination of the Legislature to abolish the jurisdiction, merely leaving to the Lieutenant-Governor the power of naming the day on which it

should take place. Such a power is purely ministerial and not legislative.

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Though it be held that the powers given to the Lieutenant-Governor, by the 9th section of Act XXII. of 1869, are legislative and not ministerial, that does not make the Act invalid, for the Governor-General of India in Council may delegate certain powers which in effect might be deemed legislative to any functionary and to any extent he may think fit. It must be remembered that the Indian Legislature is not a limited one. It is as absolute as the Imperial Parliament, whose full powers it has received, subject to certain restrictions, which are specifically mentioned in section 22 of the Indian Councils Act, 24 and 25 Vic., c. 67. There are no legal limits to the power of the Indian Legislature, but merely political ones with which this Court has nothing to do. If, however, it be held that this Court may examine the Acts of the Legislature, its power of doing so is limited to Acts which trench on the forbidden subjects, or are connected with the enacting machinery contained in the statute, and cannot extend to criticising the mode in which the Legislature thinks fit to carry out its intention. It is clear that the Legislature could do away with the jurisdiction of this Court; that it could declare that at the end of a certain time, or on the happening of a contingency, the jurisdiction of this Court over a certain district should be abolished. What more has it done here? If it be held that the Governor-General in Council cannot affect the jurisdiction of this Court, except by the direct Act of the Council assembled, for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, then this Court will not be deciding but legislating, will be imposing a restriction on the legislative powers of the Governor-General in Council which the Imperial Parliament did not see fit to do.

Again, in Act XXII. of 1869, the Legislature did not attempt to exercise any power which had not been previously exercised over and over, nor one which had not been sanctioned by the Imperial Parliament. In a long series of Acts, from 1835 to 1861, powers strictly analogous to those now contended for were exercised under 3, and 4 Will. IV., c. 85; and the Imperial Parliament, who must be presumed

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to know the construction put on this Act, as the two are *in pari materia*, so far from restraining, actually increased the legislative powers of the Governor-General in Council by 24 and 25 Vic., c. 67. If contemporary opinion and a long course of legislation are sufficient, as they undoubtedly are, to show the validity of the course pursued, then it is clear that this Court has no jurisdiction, and that the appeal cannot be maintained.

The following Acts and authorities were cited: Acts II. and VI. of 1835; XXIX. of 1837; VI. and XVIII. of 1844; VII. and XXI. of 1845; IX. of 1846; XVI. of 1847; XI. of 1848; XXXV. of 1850; I. of 1852; XVIII. of 1853; XVII. of 1854; XXII. and XXXVII. of 1855; XIII. and XX. of 1856; XXIX. and XXXVI. of 1857; XXIX. of 1858; VIII., XIII., XVI., XXII. and XXIV. of 1859; IX. and XXII. of 1860; V., XIV., XXIII. and XXV. of 1861; VI., XIV. and XIX. of 1863; XXII. of 1864; XIV. of 1865; XXIII. of 1867; *Liverson vs. The Queen*, Law Rep. 4 Q. B. 394; *Bocking vs. Jones*, Law Rep., C. P. 29; *Doye and others vs. Falconer*, Law Rep., 1 P. C. 328; *Rossiter vs. Trafalgar Life Assurance Association*, 27 Beav. 377; *Quebec and Richmond Railway Company vs. The Queen*, 12 Moore's P. C. 232; Kent's Commentaries; Sedgwick on Constitutional Law; Maxwell on Statutes.

Phillips, for the Appellants.

The jurisdiction of the High Court cannot be taken away by any authority in this country, unless specially empowered to do so by the Imperial Parliament, and no such power has been given. It cannot be held that section 9 of the High Courts Act, 24 and 25 Vic., c. 104, supports the contention of the other side without straining the language of that section. Supposing, for the sake of argument, that it does, then the power conferred by it must be exercised by the Governor-General in Council, and cannot be delegated to the Lieutenant-Governor or any other public functionary; for the Indian Legislature is a body to which powers legislative have been delegated, and therefore the rule *delegatus non potest delegare* clearly applies.—*Biddle vs. Tarriny Churn Banerjee*, Taylor and Bell 391, 477.

Had it been intended to confer on the Indian Legislature an

absolute authority subject only to certain restrictions, as is erroneously contended by the Government in this case, the Imperial Parliament would have so expressed itself. (See the Act for the union of Canada, New Brunswick and Nova Scotia, and for the Government thereof, 30 Vic., c. 3, s. 18.) The fact that section 25 of the Councils Act was passed to validate the rules made for the Non-Regulation Provinces, and the similar provisions inserted in 33 and 34 Vic. c. 34, are fatal to that contention.

The Acts cited by the other side do not apply, as the powers therein delegated are purely ministerial. Here it is wholly left to the Lieutenant-Governor to determine whether the existing legislation shall be swept away. If the Governor-General in Council can confer such a power, then there is nothing to prevent his giving to any person the power of doing away with the whole existing legislation in Lower Bengal; nothing, in fact, to prevent the whole legislative powers being transferred to a single individual.

Kennedy, in reply:

The general authority given to the Governor-General in Council to make laws is amply sufficient to carry with it the powers here contended for. There is a wide distinction between the grant of a general power and the grant of a particular power, for example, to execute a deed. In the latter case, if the grantee of the power transfers that power to some one else, he does what he was not authorized to do: he was not authorized to transfer, but merely to execute. Where, however, the Imperial Parliament has conferred a general power on the Indian Legislature to make laws, these laws may be made by it in any manner it thinks fit, and the only question can be; Is the disputed Act a law? Now, Act XXII. of 1869 is clearly a law. It is, therefore, valid unless prohibited by section 22 of the Councils Act, which it is not.

It is not necessary for me to go so far as to contend that the Indian Legislature has power to pass an Act abdicating its functions; that it clearly could not do for an obvious reason. It was called into existence by the Imperial Parliament for a permanent object, and it is only the power which called it into existence can do away with it.

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The following judgments were delivered by the High Court (1).

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The important questions which we have to decide in this case have now been maturely and anxiously considered by this Court; and although I regret for some reasons the decision at which the majority of the Court have arrived, it is satisfactory to know that the points have been argued as fully as they could have been; and that our attention has been called, as I believe it has, to all the available materials, which could guide our minds to a just conclusion.

The case has been twice argued: first, by the Legal Remembrancer on behalf of the Government of Bengal, and again, at the instance of the Government of India, by the Advocate-General and the Standing Counsel, Mr. Kennedy, for the Crown, and by Mr. Phillips on behalf of the prisoners, whose services the Government have very properly retained for that purpose.

Upon the first point which we have to determine, there is little or no difference of opinion. We are all agreed that the Governor-General in Council could, in the exercise of their legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

The only question is: Whether by the means which they have adopted they have effectually carried out that object?

The jurisdiction of the Court has certainly not in this instance been taken away by any *direct action* of the legislative body. Act XXII. of 1869 did not of itself even profess to take away that jurisdiction.

It can only be said to have done so *indirectly*, by conferring upon the Lieutenant-Governor of Bengal what was undoubtedly a very large discretionary power.

He was by that Act invested with authority to remove the district in question from the jurisdiction of the High Court, and to abolish entirely at his own discretion, and at his own time, the laws and the system of judicature which prevailed there.

He had also the power of introducing new laws, and of reconstituting a judicial system in accordance with his own views; or he might, if he had so pleased, have left the district entirely destitute of any laws, or any judicial system whatever.

It may indeed be open to grave doubt, whether, looking only to the Statutes from which the Legislature of India derive their powers, it was contemplated by Parliament that they should exercise those powers by conferring on any other person or body of persons so large a discretion.

But the question which we have to decide is, not whether in this instance the Legislature have exercised their powers wisely, or in such a way as Parliament intended that they should exercise them; but—

1st.—Whether they had the power to take away the jurisdiction of the Court by the means which they adopted; and

2ndly.—Whether that is a question, which the Courts of this country have a right to determine.

It will be convenient to deal first with the last of these points.

It was argued at the Bar that the power of making laws and regulations which was given to the Legislature of this country by the Councils Act was as extensive a power (subject to the restrictions contained in section 22) as was possessed by the Imperial Legislature; and that any enactment which they were pleased to pass under the name of a law could be no more questioned by the Courts than an Act of Parliament.

But it seems to me that a great and dangerous fallacy underlies this argument, because there may be many enactments, which the Indian Legislature may pass, and honestly believe that they have a right to pass, but which may nevertheless be *ultra vires*, and of no force at all as laws. Suppose, for example, that an Act was passed, which in point of fact infringed one of the restrictions in section 22, but which the Legislature *bona fide* believed was no infringement, would the belief of the Legislature, that they were justified in passing such an Act, prohibit Courts of Justice from inquiring into the validity of it?

Or to take another instance unconnected with the restrictions in section 22. Suppose the Legislature were to pass an Act by which they authorized certain police-officers to arrest a French subject in Chandernagore; and, upon the man being arrested in Chandernagore, and brought in custody to Calcutta, he were to institute a suit here for illegal imprisonment, would the Courts here have no jurisdiction to enquire into the legality of the

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imprisonment; and would the prisoner be utterly without remedy, simply because the Government had passed the Act, and believed that they had a right to pass it as a law?

These instances are, of course, very clear; but in others, considerable doubt might arise as to whether an Act passed by the Legislature was or was not within their powers; and in all such cases, unless Courts of Law had jurisdiction to determine this question, the Indian public would have no means of redress, and the Government here would be virtually autocratic.

It may be said, no doubt, that the right which Her Majesty in Council possesses of putting a veto on any Act which is passed by the Legislature affords some security against any excess of their powers; but it must be borne in mind that the scrutiny to which Indian measures are subjected by Her Majesty in Council is not so much a *legal scrutiny* for the purpose of ascertaining whether the Act is or is not strictly within the powers of the Legislature; but a scrutiny of policy and prudence to determine whether the Act is in accordance with the views of the Home Government, and a wise and prudent measure, having regard to the interests of the Empire.

I am, therefore, of opinion that it is the province and duty of this Court to determine whether by the Act of 1859, and the notification in the *Gazette* which was made in accordance with its provisions, the jurisdiction of this Court has been abolished; and that it is not because that Act has been passed by the Legislature *as a law* that we are disabled from enquiring into its validity.

No doubt, as soon as the fact is once established that an Act of the Legislature, which has been duly passed, is within the scope of their powers, the Courts have no right to enquire into the propriety or wisdom of the law which is established by that Act; but it is not every Act which the Legislature may pass which can legally be considered as a law.

Thus, to bring the argument nearer home to our present purpose, suppose the Legislature were to pass an Act, transferring the whole of their legislative powers over the Indian Empire to the Governor-General, that, in my opinion, would not be a law at all within the meaning of the Statute. It would simply be

an abdication of their legislative powers in favour of the Governor-General, directly at variance with the language and plain meaning of the Councils Act; and I should say the same of a similar transfer of their powers with regard to any portion of the Indian Empire.

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Now, I consider that the question in the present case is, whether that portion of the Act of 1869 which relates to the Cossyah Hills is a law properly so called, or a mere transfer of the powers of the Legislature to the Lieutenant-Governor of Bengal?

I quite agree with my learned brothers that this is a question of construction; and one to be determined, not only by reference to the Councils Act itself, but to other Acts of the Imperial Legislature which may be found to have a bearing upon the subject, and to other important considerations to which I shall presently refer.

If the Act of 1869 stood alone as the only instance of its class, and we had only to determine whether the transfer of power to the Lieutenant-Governor, which is thereby made, was such a law as the Councils Act authorized, I confess I should feel more doubt upon the question.

But, having regard to the course and character of the legislation which has been going on in this country, and in England with reference to this country, for the last forty years, it appears to me that the Imperial Legislature have themselves put a construction upon the Councils Act, which (so long as it is not inconsistent with the language of the Act itself) we are bound in duty to adopt, however much it may be opposed to our first impressions; and I quite think also, that every reasonable intendment which can legally be made by this Court in favour of the validity of the Acts of the Legislature should undoubtedly be made.

Now, upon looking back through the Acts of Council since the year 1833 when the East India Company's Charter Act was passed, it seems to me impossible to resist the conclusion that the principle and the course of action, which has constantly been pursued by the Legislature of this country, is precisely that which is now called in question in the Act of 1869.

By the Act of 1833 the legislative powers which were then

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conferred upon the Governor-General in Council were in the same language and (for the purposes of the present case) to the same effect as those given by the Councils Act in 1861; and from the time when that Act passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instrumentality of high officials and public bodies, in whom a large discretion has been vested for that purpose; and, when we consider the extent and variety of the business of the Legislature, it is difficult to see how, without such machinery, they could effectually discharge their functions.

It would seem almost impossible in a country like British India, so vast in extent, so various in its population, its laws, and its customs that the Legislature could perform its multifarious duties satisfactorily, without entrusting to the Executive Government, to the Governors of provinces, or to other high officials and representative bodies, a considerable share in the working out of their manifold and comprehensive measures; and it would also seem impossible that they should do this effectually without vesting in those high personages and bodies a large amount of discretionary power.

Moreover, it must be borne in mind that, whatever important trusts are thus created by the Legislature, they are by no means absolute or irrevocable. Her Majesty in Council can put a veto upon any Act of the Governor-General in Council which her advisers may not approve, and the Government here are always in a position to see how the powers which they have conferred are being exercised; and if they are exercised injudiciously or otherwise than in accordance with their intentions; or if, having been exercised, the result is in any degree inconvenient, they can always by another Act recall their powers or rectify the inconvenience. Now, it will be sufficient for my present purpose that I should refer to a few only of the Acts of Council which were passed by the Legislature between 1833, the year of the East Indian Charter, and the passing of the Councils Act in the year 1861; and I would refer, in the first place, to the Procedure Codes of 1859 and 1861, as being remarkable instances of the course of action to which I have alluded.

The Civil Procedure Code of 1859, which effected a great

change in the law, was only applied in the first instance to the Regulation Provinces of Bengal, Madras and Bombay; and, under the provisions of section 385, it was not to take effect in any other parts of India until it should be extended thereto by the Governor-General in Council, or by the Local Government of any Non-Regulation territory. Thus, the Lieutenant-Governors of Non-Regulation Provinces were empowered at their own discretion, and at their own time, to extend, each to his own territory, the provisions of a Statute, which not only introduced an entirely new procedure into the Civil Courts, but contained enactments which affected very materially the rights, liberties and property of the subject; and by Act XXIII. of 1861 (which was passed in the same year as the Councils Act) the Local Governments of Non-Regulation Provinces were invested with a much larger discretion; because they were by that Act authorized to introduce the same Code into their respective provinces, subject to such restrictions, limitations and provisos as they might think proper.

Then, again, by Act XXV. of 1861, the Criminal Procedure Code, a similar power was given to certain Local Governments of introducing at their own option the provisions of that Code into their respective territories; and this Act not only introduced new modes of procedure, but contained many enactments which made a very material change in the Criminal Law.

It seems to me impossible to deny that these Acts did in fact confer upon the Local Governments of Non-Regulation Provinces precisely the same kind of power, although different in degree, as by the Act of 1869 was vested in the Lieutenant-Governor of Bengal: they placed entirely in the hands of the Local Government of those provinces the right of abolishing at their pleasure the old system of procedure, and of introducing a new system which very materially changed the law, and affected the rights and liberties of the inhabitants of those provinces.

And the Civil Procedure Code of 1861 went further, because it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so to introduce a different law into their respective provinces, from that which was in force in the Regulation Provinces.

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And there were many other Acts passed during the period which I have defined, in which the Legislature proceeded upon the same principle, although the powers conferred by those Acts might not have been so extensive as in the two instances which I have just named.

Thus, Act II. of 1835 gave the Bengal Government full power to issue any instructions which it might think proper for the control and guidance of the Courts of Assam and Arracan.

Act VI. of 1835 contained similar provisions with regard to the Courts in the Cossyah Hills.

Act XXI. of 1845 authorized the Governor-General in his executive capacity to place any of certain specified territories under a totally different system of law from that to which they were then subject.

Act IX. of 1846 empowered the Madras Government to make laws for the regulation of the Madras harbour.

Act XVI. of 1847 conferred upon certain Commissioners the right of making Bye-laws for the Town of Calcutta.

Act XI. of 1848 gave the same Commissioners still larger powers of a similar kind.

Act I. of 1852 empowered the Bombay Government to make laws for the regulation of the Bombay harbour.

Act XXII. of 1860 affords a more striking illustration of the same principle. By that Act the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the ordinary Courts, both civil and criminal, and from the control of the Revenue laws and officers; and they were placed entirely in the hands of the Lieutenant-Governor of Bengal, who was to appoint what Courts and officers he thought proper, and give what instructions he pleased for the governance of such Courts and officers.

And again, Act XIV. of 1861 contained similar provisions with regard to the Rohilkund Hill Tracts; placing the administration of justice and the management of the revenue in the hands of the Lieutenant-Governor of the North-West Provinces.

Now, all these Acts amount in one sense to a transfer of legislative power, because in each of them the Legislature entrusts to some other person or body of persons the making of laws and regulations, which it might have made itself.

Thus, instead of making laws for the regulation of the harbours of Madras and Bombay, it has transferred the power of making those laws to the Local Governments.

Instead of introducing the Procedure Codes into the Non-Regulation Provinces, it has left the introduction of those Codes to the discretion of the Local Governments.

Instead of organizing a system of judicature and Revenue laws for outlying districts, such as Assam and the Chittagong and Rohilkund Hill Tracts, it has transferred to the Local Government the duty of making laws for these districts.

The difference between the transfer of authority in all these cases, and in that which we are now called upon to decide, appears to me *one of degree only not of principle*; and if Courts of Justice had to determine in each of such cases how far the Legislature might or might not go in the creation of these important trusts, and in conferring powers upon high officials which they might have exercised themselves, the task would not only be one of extreme difficulty, but must lead, in my opinion, to most inconvenient results.

Has then the Legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdicating its proper functions and transferring powers which it had no right to transfer? The answer to this question will be found in the Councils Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833 which it seems to me almost impossible to misunderstand.

It cannot seriously be supposed that the Imperial Parliament, when it was re-constituting and strengthening the Legislative Council in 1861, conferring upon it fresh powers, and subjecting it to restrictions which had not been previously imposed, could have been in ignorance of the mode in which the powers of legislation, which had existed for nearly thirty years, had been exercised by the Governor-General in Council.

The Acts of that Legislature had been regularly transmitted to England for the approval of Her Majesty in Council.

They were well known to the authorities at the India House. They had been considered by Her Majesty's advisers; and many of them, more especially the Procedure Codes, had been care-

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The Act of 1859 was prepared and passed under the auspices of Sir BARNES PEACOCK; and the Acts of 1861 were also passed at the time when he was, not only Chief Justice of the High Court, but also a Member of Council.

It cannot be supposed, therefore, that if the provisions of those Acts had been contrary to law or even questionable, they would have escaped the vigilance of Sir BARNES PEACOCK, whose keen perceptions and long experience, both as a Legislator and as a Judge, rendered him peculiarly capable of detecting any such illegality.

Nor, on the other hand, can it be supposed that the Imperial Parliament would have renewed in the Councils Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the Legislature had been pursuing.

The fact that, with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did in the Councils Act renew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment, that the course of action which had been pursued by the Legislature in the exercise of those powers was one which the Act had authorized.

As regards the case of *Biddle vs. Tarriny Churn Banerjee*, which has been relied upon by Mr. Justice MARKBY, I need only say that, although I entertain the greatest respect for the learned Judges who took part in that decision, I cannot help considering that the view which they took in that case of the powers of the Legislature has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833.

I believe that, at the time when that case was decided, it was generally supposed that the power of the Legislature to transfer its authority was very limited. If that case were now law to the full extent of the decision, it would follow that a great many Acts of the Legislature, which have been acted upon as laws for years past, and are acted upon now, were altogether illegal.

I am, therefore, of opinion that Act XXII. of 1869, the principle of which I cannot distinguish from that of the Acts which I have mentioned, was a law which the Legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the district in question from the jurisdiction of the High Court. But, as the majority of the Court are of a contrary opinion, the appeal made by the prisoners will be entrained, and the records will be sent for.

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It is much to be desired that this adverse judgment, and the vast importance of the question which it involves, may induce the Government of India to take this case, if it is open to them to do so, on appeal to the Privy Council (1).

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In my opinion the Governor-General in Council has power by legislation to remove from the jurisdiction of this Court a district over which the Court was declared by the Letters Patent to have jurisdiction. That power seems to me to be expressly conferred by section 9 of 24 and 25 Vic., c. 104—without which section legislation on the subject would be wholly prohibited by the proviso in 24 and 25 Vic., c. 67, s. 22, namely, that the Governor-General in Council shall not have the power of making any law which shall repeal or in any way affect any of the provisions of that Act or of any Act passed in the same session, or thereafter to be passed, in any wise affecting Her Majesty's Indian territories or the inhabitants thereof.

These two Statutes, 24 and 25 Vic., cc. 67 and 104, were passed within a few days of each other (one on the 1st of August and the other on the 6th), and I think it clear that it was intended by sections 9, 11 and 13 of the later Act to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the proviso in section 22 of Chapter 67, the Governor-General in Council would not have had. A consideration of the terms of the High Courts Act will show that the matters covered by the three sections 9, 11 and 15—in which alone the legislative powers of the Governor-General in Council

(1) The appeal is now pending before the Privy Council, and will be reported in due course.

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are saved—are the only matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. And the express saving of these powers in sections 11 and 13 was necessary, because those sections relate to matters not included or dealt with in section 9. The Governor-General in Council has no legislative power in relation to the High Court save what is reserved to him by 24 and 25 Vic, c. 104; and the Letters Patent could give no such power not already given by that Statute.

Although I do not doubt that the conclusion arrived at in *Meares's case* (1) was correct, I do not concur in the construction there put upon these two Statutes. I dissent wholly from the theory, which seems to be the basis of the late Chief Justices's decision in *Meares's case*, that a declaration of jurisdiction contained in the Letters Patent can be affected by legislation by the Governor-General in Council, because the declaration in the Letters Patent is not a "provision of the Act" within the meaning of section 22. In my opinion it is a provision of the Act within the meaning of section 22, and, as such, the legislative powers of the Governor-General in Council would be wholly barred in respect of it were those powers not given or reserved to the Governor-General in Council by section 9 of the High Courts Act. It is only, so far as legislative powers are expressly given or reserved by 24 and 25 Vic, c. 104, that the Governor-General in Council has any legislative authority over the jurisdiction, &c., of the High Court. Section 9, however, does seem to me to give the Governor-General in Council plenary powers of legislation as regards the jurisdiction. For I read that section as declaring that the Court shall have and exercise all such civil and other jurisdiction, original and appellate, and all such powers in relation to the administration of justice in the Presidency as the Letters Patent shall direct and save as by the Letters Patent otherwise directed, and subject and without prejudice to the legislative powers of the Governor-General in Council in relation to the matters aforesaid (*i.e.*, all the matters mentioned in section 9 with which the Crown is authorized to deal in the Letters Patent), the Court shall have and exercise all jurisdiction and

every power, &c., in any manner vested in the abolished Courts (Supreme and Sudder) of the same Presidency. The section, in short, vested in the new Court all the jurisdictions and all the powers of every description of the two abolished Courts, except so far as those jurisdictions and powers might be altered or taken away by the Letters Patent or by subsequent legislation by the Governor-General in Council.

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This construction of the Statute, no doubt, leads to the conclusion that the Governor-General in Council has power to alter wholly, and to take away, the jurisdiction of the High Court; and, further, that the Governor-General in Council is the only authority in India by which the jurisdiction or powers of this Court can be altered or in any way affected. Nevertheless, it appears to me to be the right construction: and it is the construction which, as a matter of fact, was invariably put upon the law up to the time of *Meares's case*. If it be the right construction, it cannot be questioned that the Governor-General in Council could legally remove the Cossyah and Jynteeah Hills from our jurisdiction.

But it is argued that, if the Governor-General in Council had this power, it has not been legally exercised, inasmuch as the Governor-General in Council did not attempt or profess to remove the Cossyah and Jynteeah Hills from the jurisdiction of the High Court, but merely passed an Act authorizing the Lieutenant-Governor to remove them if he at any time should think fit to do so. And it is contended that a removal by an order based on the authority thus given to the Lieutenant-Governor of Bengal is not legal.

It is an undeniable fact that the Governor-General in Council did, by Act XXII. of 1869, empower the Lieutenant-Governor of Bengal at his pleasure to extend the provisions of the Act to the districts in question, and that by virtue of the power so conferred on the Lieutenant-Governor those provisions have since been extended in the manner contemplated.

The first question which here arises is, whether the Governor-General in Council, having passed such an Act, this Court can decline to recognize or be bound by it, on the ground that it was *ultra vires* of the Governor-General in Council to legislate in such a fashion, *viz.*, to delegate to the Lieutenant-Governor of Bengal

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functions which were expressly vested in the Governor-General in Council.

In considering this matter, it is necessary to go back a little and see what the legislative powers of the Governor-General in Council really are

The Statute 3 and 4 Will. IV., c. 85, s. 43, gave the Governor-General in Council power to make laws for repealing or altering any laws or regulations whatever then in force or thereafter to be in force (in British India, &c.), and for all persons of whatever nationality,—and for all Courts of Justice, whether established by Royal Charter or otherwise, and the jurisdiction thereof,—*save and except* that the Governor-General in Council was not to have power by legislation to repeal or alter any of the provisions of that Act (3 and 4 Will. IV., c. 85) or of any Act to be thereafter passed affecting the East India Company or the said territories or the inhabitants thereof, &c. * This power of legislation was (section 44) subject to the right of the Court of Directors to disallow any law which might have been passed, which was thereupon (*i.e.*, if disallowed) to be repealed.

By section 45 it was enacted—and this section stands unrepealed to the present day—that all laws made as aforesaid, (*i.e.*, by the Governor-General in Council under the powers given by that Act) “shall be of the same force and effect within and throughout the said territories as any Act of Parliament would or ought to be within the same territories, and shall be taken notice of by all Courts of Justice whatsoever within the same territories, in the same manner as any public Act of Parliament would and ought to be taken notice of; and it shall not be necessary to register or publish in any Court of Justice any laws or regulations made by the said Governor-General in Council.”

By the Statute 16 and 17 Vic., c. 95, the Council of the Governor-General for legislative purposes received a new constitution; but the legislative powers of the Council and the effect to be given to its Acts remained as they were under Statute 3 and 4 Will. IV., c. 85.

The Statute 17 and 18 Vic., c. 77, s. 3, empowers the Governor-General in Council, with the consent of the Home authorities, from time to time, by proclamation, to take any dis-

district under the immediate management of the Governor-General of India in Council, and thereupon to give all necessary orders respecting the administration of such district, or otherwise to provide for the administration thereof. But it is expressly provided that no law or regulation in force in any such district, at the time it is so taken under the immediate management of the Governor-General of India in Council, shall be altered or repealed, except by law or regulation made by the Governor-General of India in Council.

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Then came the Indian Councils Act, 24 and 25 Vic., c. 67, which again gave a fresh constitution to the Council of the Governor-General for making laws and regulations. This Act, however, to describe it generally, left the legislative powers of the Governor-General in Council unaltered, save that local legislatures were re-established and certain matters appertaining more peculiarly to the Executive were declared (section 19) not to be cognizable without the previous sanction of the Governor-General. The legislative power which was taken away from the Presidencies of Madras and Bombay by 3 and 4 Will. IV., c. 85, was, in a modified degree, restored to them; and the establishment of a local legislature for Bengal was authorized. The legislative powers conferred on the Governor-General in Council by 3 and 4 Will. IV., c. 85, were left unimpaired; but under the new Act, 24 and 25 Vic., c. 67, were to be exercised for the most part in matters of more general administration and such as affected the interests of the Indian Empire at large.

In the preamble of the Councils Act it is merely recited that it is expedient that the provisions of former Acts of Parliament respecting the constitution and functions of the Governor-General in Council should be consolidated, and in certain respects amended.

The second section repeals sections 40, 43, 44, 50 and certain other sections of 3 and 4 Will. IV., c. 85; and it is declared that all other enactments then in force, with relation to the Council of the Governor-General of India, or to the Councils of the other Presidencies, shall continue in force, "save so far as the same are altered by, or are repugnant to, this Act."

Section 22 declares the powers of the Governor-General in Council as regards the subjects of legislation. It is, in truth,

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a mere re-enactment of the repealed section 43 of 3 and 4 Will. IV., c. 85, altered formally and with reference to the changes which were being made in the constitution of the Council. It gives the Governor-General in Council power to repeal or alter any existing law of whatever kind, save that it expressly provides that the Governor-General in Council shall not have the power of making laws or regulations which shall repeal or in any way affect any of the provisions of the Act itself (24 and 25 Vic., c. 67), or any of the then unrepealed sections of 3 and 4 Will. IV., c. 85, and 17 and 18 Vic., c. 77, and certain other Statutes named,—and, save also that the Governor-General in Council shall not have power to make laws which repeal or affect any provisions of any Act passed in the then present Session of Parliament, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

The 3 and 4 Will. IV., c. 85, remains in force, except so far as it is expressly repealed or is repugnant to the Councils Act, section 45 is still unrepealed, though the Councils Act repeals the two sections immediately preceding and section 50 which follows it. And there is nothing in section 45 repugnant to the Councils Act. Therefore, it is clear that section 45 is still in force, and applies to all laws made by the Governor-General in Council under the Councils Act. Of course, an Act passed by the Governor-General in Council in contravention of section 22 of 24 and 25 Vic., c. 67, would not be an Act duly passed, the legislative powers of the Governor-General in Council being by that section expressly barred in such cases. But an Act passed by the Governor-General in Council under the Councils Act, and not falling within any of the prohibitions therein contained, seems, under section 45 of 3 and 4 Will. IV., c. 85, to have the same effect here as an Act of Parliament would or ought to have; and it must be taken notice of by us in the same manner as any public Act of Parliament. If this be so, this Court has no power to question the authority of the Governor-General in Council, if once satisfied that the Act is not within any of the prohibitions of the Councils Act. For there is no doubt that, had a public Act of Parliament been passed in the same terms as Act XXII. of 1869, we should have been bound to accept it without question.

But, if it be open to me to question the authority of the Governor-General in Council to pass a law which does not fall within any of the restrictive provisions of 24 and 25. Vic., c. 67, I am unable to say that the Cossyah and Jynteeah Hills have not been legally removed from the jurisdiction of the High Court.

By section 4 of the Act, the Governor-General in Council did expressly remove the Garo Hills from our jurisdiction, leaving it, however, to the Lieutenant-Governor of Bengal to fix the date from which the removal was to have effect. Then (sections 5-8) the Governor-General in Council practically left it to the Lieutenant-Governor to provide, as he should think fit, for the administration, in all respects, of the district, and gave authority to the Lieutenant-Governor to extend to the Garo Hills any law, or any portion of any law, then in force in the other territories subject to the Lieutenant-Governor, or which might thereafter be enacted by the Council of the Governor-General, or of the Lieutenant-Governor for making laws and regulations.

As regards the Cossyah and Jynteeah Hills, after in section 3 repealing Act VI. of 1835 (which repeal, it may be noted, did not of itself in any way affect the jurisdiction of the High Court over those Hills), the Governor-General in Council by section 9 empowered the Lieutenant-Governor from time to time to extend, *mutatis mutandis*, all or any of the provisions contained in the other sections of the Act to the Cossyah and Jynteeah Hills. It is left to the Lieutenant-Governor to say whether these districts shall be removed from the Court's jurisdiction or not, and also, if removed, what law shall be administered in them. No doubt, the whole future position of the Cossyah and Jynteeah Hills is left absolutely to the discretion of the Lieutenant-Governor. For all that is really decided by the Governor-General in Council is that it is fit and proper that the Cossyah and Jynteeah Hills shall be removed from the jurisdiction of the High Court if the Lieutenant-Governor shall think it right at any time that they shall be so removed. No other matter is actually decided by the Governor-General in Council than that it is right that these districts shall be made over wholly to the Lieutenant-Governor's control, if and when he chooses to take them over.

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It is impossible to deny that this is practically an entire delegation to the Lieutenant-Governor by the Governor-General in Council of the legislative powers of the Council. But on what precise grounds can I say that such delegation is illegal? The Act does not fall within any of the restrictive provisions of the Statute 24 and 25 Vic., c. 67; and there is no positive law which prohibits such delegation. The question is really one of intention: What powers did the Supreme Legislature intend to confer on the subordinate Legislature, the Council of the Governor-General of India, for the purpose of making laws and regulations?

Reading the Councils Act with the High Courts Act, 24 and 25 Vic., c. 104, it is sufficiently clear that the intention of the Supreme Legislature was, that the jurisdiction of the High Court should remain as defined in the Statute, c. 104, except so far as otherwise declared by the Letters Patent, or by the legislative enactments of the Governor-General in Council. And it is fairly argued that, if the Statute gave no power of legislation in such matters to any authority in India, save the Governor-General in Council, it could not have been the intention that the Governor-General in Council should, by legislation, confer on the Lieutenant-Governor these powers which it was clearly intended should be exercised by the Governor-General in Council alone.

But, although I do not doubt that the Governor-General in Council is the only authority in India who can by legislation affect the jurisdiction of this Court, I am not prepared to say that, if the Legislative Council of the Governor-General passes an Act declaring that such rules affecting the jurisdiction as the Lieutenant-Governor may make shall have the effect of law, and if rules affecting the jurisdiction are thereupon made by the Lieutenant-Governor, the alteration of the jurisdiction would be otherwise than by the Governor-General in Council in exercise of their legislative powers. For, if we hold that the Governor-General in Council must, if the object is to affect the jurisdiction of this Court, do it by the direct act of the Council assembled for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, we are, in fact, legislating and imposing a

restriction on the legislative powers of the Governor-General in Council which is not imposed by the Statute.

There are, as I have said, grounds for arguing that the intention was, that legislation to affect this Court's jurisdiction should be by the Governor-General in Council directly, and not by delegation. On the other hand, the Statute does not expressly say so; and it might have been expected to say if such had really been the intention, inasmuch as, for years prior to the passing of the Statutes of 24 and 25 Vic., powers of legislation had been delegated repeatedly by the Governor-General in Council to the Lieutenant-Governor and other executive officers, and it may be presumed that in framing these Statutes provision would have been made against a repetition of the evil, had it been deemed in fact to be an evil.

Act XXII. of 1869 is certainly an exceedingly strong instance of legislation by the Governor-General in Council in a manner amounting to a delegation to the Lieutenant-Governor of Bengal of the legislative powers of the Council. Still, powers of a similar nature (though usually not so extensive) have constantly for years past been given by the Governor-General in Council by legislation to various executive authorities. It is very difficult, for example, to distinguish in principle the present case from that of the Civil Procedure Code (Act VIII. of 1859), which, by section 385, took effect in any part of the territories not subject to the general regulations only when extended thereto by the Governor-General in (Executive) Council, or by the Local Government to which the particular territory happened to be subordinate. In like manner, the first Criminal Procedure Code (XXV. of 1861) took effect in Non-Regulation Districts only when extended to them by the Governor-General in (Executive) Council, or by the Local Government to which the territory was subordinate. It is substantially neither more or less than a delegation of legislative authority to say to the Lieutenant-Governor or any other officer: "Here is a new Code; but it is left wholly to your discretion to decide whether—and, if at all, when—it is to be applied to such and such territories now under your government." The principle in these and other such cases is really the same as in the case now before us; yet such delegations are frequent.

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Altogether, I do not think that the passing of Act XXII. of 1869 was absolutely *ultra vires* of the Governor-General in Council; and, after the course of practice which undoubtedly has been followed in this matter for very many years, I should certainly decline to declare such an Act to be beyond the powers of the Governor-General in Council, unless I considered it clear beyond all question that it was so.

I think, therefore, that we have no jurisdiction to entertain this appeal.

Various important points, which I have not touched upon, have been discussed in the course of the argument; but, in the view which I take of the position of the Legislative Council of the Governor-General with reference to this Court, it seems to me unnecessary to go further into them.

PONTIFEX, J.

PONTIFEX, J. :—

I concur in the judgment of Mr. Justice MACPHERSON.

JACKSON, J.

JACKSON, J. :—

Assenting, as I do, to the decision in *Feda Hossein's case* (I. L. R., 1 Cal 431), and being therefore of opinion that the jurisdiction of the High Courts can be affected by legislative action of the Governor-General of India in Council, and by no other authority in this country, I have only to consider whether our jurisdiction has been validly taken away; and whether, if we should think otherwise, we are competent to give effect to our opinion.

It is contended on behalf of the Crown that the jurisdiction of this Court over the Cossyah and Jynteeah Hills was put an end to by a notification of the Lieutenant-Governor of Bengal, dated 14th October 1871, which notification purports to have been issued under the authority of the 9th section of an Act of the Governor-General in Council, called Act XXII. of 1869, which received the assent of the Governor-General on the 24th September of that year.

It is further contended that the clause of this Act, which empowered the Lieutenant-Governor to issue such proclamation, is a law made by the Governor-General in Council under the authority

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of 24 and 25 Vic., c. 67; that by virtue of clause 45, 3 and 4 Will. IV., c. 85, a law so made is of the same force and effect in India as any Act of Parliament, and that consequently neither this nor any other Court in India is competent to inquire into the validity of the Act, or to question the mode in which the Legislature carries out its conclusions.

I will address myself first to the latter branch of this argument, and for this purpose it is necessary to state what my opinion is regarding the constitution and powers of the Indian Legislature.

This body is composed of the members of the Executive Government, with the addition of certain persons (not to be less than six or more than twelve in number) nominated by the Governor-General as members of the Council for the purpose of making laws and regulations only. It derives its powers from Parliament and from no other source⁽¹⁾, and those powers are to be exercised in a particular manner, and are compassed by certain bounds.

The powers in question, sparingly granted at first, subjected originally—and down to 1834—to the necessity of registration in the Supreme Courts, and thereafter to the inspection and control of both Houses of Parliament, were gradually enlarged by successive regulating Acts, until they reached their present limits.

They are now defined by the Statute known as the Indian Councils Act, 1861.

By that Act the Council, when constituted for legislative purposes, was declared absolutely incapable of transacting any business, or entertaining any motion other than the consideration and enactment, or the introduction, of measures of a legislative kind, except that it might amend the rules for the conduct of its business which had been made before it came into existence.

The legislative powers committed to the Governor-General in Council are described, and the restrictions on them set forth, in the 22nd clause of the Statute.

It was observed during the argument that there is a distinction between the grant of powers which are absolute, except as to matters expressly reserved, and that of powers extending only up to certain limits, not beyond; it was contended that the former of

(1) See Forsyth's cases and opinions on Constitutional Law, p. 17. See also Harrington's Analysis, first part, section i.

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these was the description applicable to the powers of the Indian Legislature. It seems to me that the contrary is the case for the following reasons:—

The section which defines, and guards by various provisos, the powers conferred for legislative purposes is thus entitled: "Extent of the powers of the Governor-General in Council to make laws and regulations at such meetings." It is, no doubt, one of the rules for construing Statutes that no weight is to be allowed to the marginal notes, nor should I refer to this one, but that the powers for like purposes entrusted to Governors in Council are similarly defined in clauses 42 and 43, and such defining clauses are afterwards referred to in clause 48 as provisions *limiting* the power of the Governors in Council. The powers expressly conferred by section 22 are:—

"Subject to the provisions herein contained, to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force, or hereafter to be in force in Indian territories, and to make laws and regulations for all persons, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty."

This language appears to me to contemplate the exertion and exercise of the legislative mind of the Council in relation to the subject-matters indicated, and not to include the enabling of any person or any body of persons to repeal laws at their pleasure, or to make laws for Courts of Justice or the like.

But, before pursuing this topic further, I return to the question of the competency of this Court to discuss the validity of the Act; and on this point I think that one argument may be derived in favour of the opinion which I hold from the very provision of the Act of William IV. on which the advisers of the Crown have placed so much reliance. If we are to interpret the 45th section of that Statute in the way contended for—and the words are given the fullest sense of which they are susceptible—it would be necessary to hold that an Act of the Indian Legislature once passed, whether it observed or transgressed provisos, would be good and valid until repealed, for the words of the section are that *all* laws and regulations made as aforesaid (which means, *vide* section 44, 'by the said Governor-General in Council made'),

so long as they shall remain unrepealed shall be of the same force and effect, &c.

Now, it is not contended that a law and regulation made by the Governor-General in Council, forbidding the Secretary of State from borrowing money in England for the service of India, or altering the Mutiny Act, would be valid, or would have any force or effect; and therefore some limitation must be put upon the sweeping terms of section 45.

But it seems manifest that Parliament must have had in mind the possibility and propriety of such laws being questioned on grounds apart from the breach of any of the provisos contained in section 22. For section 24 expressly provides that—

"no law or regulation made by the Governor-General in Council . . . shall be deemed invalid, by reason only that it affects the prerogative of the Crown."

and the 14th section provides that—

"no law or regulation made by the Governors-General in Council, in accordance with the provisions of this Act, shall be deemed invalid, by reason only that the proportion of non-official members hereby provided was not complete."

Clearly, therefore, in these cases it was thought necessary to protect the laws in question from being called in question, and the place of question must certainly have been the Courts in this country.

From these premises, therefore,—the limited character of the Legislature, the conspicuous absence of sovereign, or even general powers, the language of the Statute in section 48, and the provision against challenge on specified grounds,—I deduce the opinion that the Courts in India must have the power of examining the Acts of the Indian Legislatures for the purpose of enquiring whether they have been made in accordance with the limited (though doubtless extremely large) powers conferred by Parliament, and also in the manner prescribed by Statute; and, further, that the effect and force attributed to such Acts by section 45 of 3. and 4. Will. IV., c. 85, belongs only to laws passed under those same conditions.

But it is further contended that, if the Courts have any such power, it can only apply to the provisions touching forbidden subjects, or to those connected with the enacting machinery which are contained in the Statute, and that it cannot extend to criticising

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the mode in which the Legislature thinks fit to carry out its intentions.

If this were so, my answer to the objection would be that, in the case before us, the Legislature has expressed no intention at all, but has merely given anticipative sanction to any course which the Local Government may, at any time, think fit to take in reference to a matter as extensive and important as any matter can be.

But I think this Court is bound, where its jurisdiction is concerned, and more especially in a matter of criminal jurisdiction, to examine every objection to the validity of an Act, not of course in a captious spirit, remembering indeed that it is under the Legislature, but also that both are the creatures of Parliament.

I have already said that the language of the 22nd clause of the Indian Councils Act appeared to me not to warrant the handing over to any specified person the power to repeal or to make laws, and it is manifest that such is the effect of section 9, Act XXII. of 1869. It in fact enables an authority, quite distinct from the Government of India in either its legislative or its executive capacity, to abolish, if it thinks fit, all tribunals and all constituted authorities in a given tract of country, and to do so at any future time, and with reference to a condition of things not even approximately understood by the Legislature.

In point of fact, the discretion entrusted to the Lieutenant-Governor was not exercised till more than two years after the passing of the Act,—was not exercised at all by the Lieutenant-Governor in office when it was passed, nor even was that Lieutenant-Governor a member of the Council which passed it, for the Act, as is well known, was passed at Simla, where, by Statute, the Lieutenant-Governor of the Punjab, and not the Lieutenant-Governor of Bengal, sits in the Indian Legislature.

It seems to me, therefore, clear that the mind of the Governor-General in Council was not, and could not, have been applied at all for legislative purposes, to the circumstances of the Cossyah and Jynteah Hills in or about October, 1871, and that he did not by any law, at that or any other time, take away the jurisdiction of the High Court.

The Legislature, being competent to take away by a law this Court's jurisdiction, might also no doubt by a law declare that, at

the end of two years such jurisdiction should cease; but it made no such law, and evidently had not made up its mind upon the subject one way or the other.

Bentham, in his *Chrestomathia* (Work, Vol. VIII., page 94, note), defines a law as—

"a discourse . . . expressive of the *will* of some person or persons to whom, on the occasion and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience;

and he gives a very similar definition elsewhere (Vol. III., p. 215). A Regulation can be hardly a less positive or determinate expression of will enforced by sanction.

If a law includes a declaration that a given person may do, or not do, a particular thing, as he chooses, and if the permissive enactment in section 9, Act XXII., is a lawful exercise of the legislative power conferred on the Governor-General in Council, then it would be equally within that power to enact that it should be competent to the Lieutenant-Governor to abrogate and to re-introduce at his pleasure the whole of the existing law in every part of the Lower Provinces.

That, it will doubtless be said, would be a lawful, but an absurd and culpable, stretch of legislative power; and it ought to be assumed that no such extravagance could emanate from the Governor-General in Council, but in truth the case supposed is not by many degrees removed from the case before us; only the character of such an Act is palpable when applied to our own case, which escapes observation when it refers to a distant and little-known object.

At any rate, the argument for the Crown is capable of being pushed to the most dangerous lengths; and, if the case appeared to me only doubtful, I should think it more reasonable to conclude that Parliament had not intended to allow a latitude which might, though it presumably would not, be so abused.

But there are other reasons which, as I think, point with equal plainness to the same conclusion. Parliament itself seems to have commented on this matter, in some places indirectly, in others directly.

The 25th section of the Indian Councils Act recites that it has been doubted whether the Government of India had the power of

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1877 making rules or laws for the Non-Regulation Provinces otherwise than by way of formal legislation, and it then proceeds to validate all such rules or laws made *prior to the passing of this Act*. Now, irrespectively of what seems to me the unmistakable provision in favour of *past rules only*, it occurs to me to ask why, if the powers of the Indian Legislature have as wide an extent as is claimed for them, resort was had to the authority of Parliament in this matter? Why should not the Governor-General in Council have passed an Act legalizing such rules of previous date, and permitting them for the future? It was, it seems to me, because its powers were considered unequal to that strain, and because Parliament, in legalizing the past, thought it not right to sanction the practice in the future.

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A somewhat similar measure of those powers is presented by the enactment of the Statute 34 and 35 Vic., c. 34, which it seems to me, in the view contended for on the part of the Crown, would have been at least in part superfluous.

These declarations of the British Parliament seem to me, on the one hand, to indicate a distinct view as to the powers of the Indian Legislature, and, on the other, an equally distinct determination that every relaxing of the strict rule as to the form of legislation should emanate from itself.

In short, it seems to be clear that, after the passing of the Indian Councils Act down to 1870, all legislation for every part of British India was required to be by laws passed at a meeting for making laws and regulations.

That undoubtedly was, and probably continues to be, the opinion of Sir Henry Maine, for it is plainly so stated in a paper of his written in 1868, which he has published as an Appendix to his work on Village Communities. And on this point, I think myself justified in referring to the despatch of Sir Charles Wood in transmitting a copy of the Indian Councils Act to Lord Canning's Government.

I am aware that there is high authority against such references, and also of the danger in some instances of making them; but the despatch is, in this instance to be used against the Crown, whose Minister Sir Charles Wood then was; and I believe there is no reason whatever for supposing that the Secretary of State was not

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on that occasion a perfectly faithful interpreter of the meaning of Parliament, or that the decision of Parliament in this particular was at all other than what the Ministry intended it to be.

Sir C. Wood says in paragraph 27 of the despatch (written in August, 1861): "You will observe, however, that henceforth legislative measures affecting any of the territories, Regulation or Non-Regulation, under the dominion of Her Majesty at the date of the passing of the Act, must be passed either by the Council of the Governor-General or by that of the Government to which such territories may be subject."

It would be, I think, a very imperfect and unreal compliance with that injunction, if the Governor-General in Council contented himself with a legislative declaration that the local Executive might, in a given locality, do anything that pleased it.

But further, as in regard to some of these provinces, a more convenient and flexible procedure was found to be requisite; and, as the remedy was in the hands of Parliament, a further Act was passed in 1870 (33 Vic., c. 3), wherein it was declared to be expedient that provision should be made to enable the Governor-General of India in Council to make regulations for the peace and good government of certain territories in India otherwise than at meetings for the purpose of making laws and regulations; and provision was made accordingly.

It cannot have been intended that there should be in existence, simultaneously, two methods of changing the law for such territories; and I should, therefore, consider that for this reason alone, the course taken under the Act of 1869 about a year and a half after the passing of the Statute just mentioned, was bad; but I also think it in plain contravention of the Indian Councils Act.

As to the nature and extent of the legislative powers intended to be conferred on the Indian Government (it is really that) by the Indian Councils Act, any one who desires to observe how differently Parliament works when it gives complete authority, reserving only its own supreme and paramount rights, need only compare that Act with the Statute 30th vic., c. 3, constituting the Dominion of Canada with its superior and subordinate Legislatures.

One argument, however, which was much relied on, I must not leave unnoticed, although I do not deal very fully with it.

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Our attention was drawn to a great number of instances in which, beginning from 1844-45 and coming down to the present time, a power had been exercised more or less analogous to that used in the present instance; and with reference to these enactments it was contended, *first*, that a long course of legislation of the permissive or delegatory kind must be taken to have established the practice, and therefore the authority, of that course; and, *secondly*, that inasmuch as many of such enactments were anterior to the Indian Councils Act, Parliament must be taken to have noticed the course of practice, and by passing it over in silence to have sanctioned what it observed.

As to this, it seems to me in the first place that the great majority of the Acts named in the list handed up to us differ so widely from the present one as to be of little value for the purpose of the argument.

It often happens, and must often happen, that the usurpation of a power passes unnoticed, or at least unchallenged, when the occasion is insignificant, or when the attendant circumstances appear to justify or to excuse the encroachment.

To leave to an inferior or a different authority the provision of means for carrying out a law, or to entrust to its discretion the choice of a precise date for putting it in force, appears to me not incompatible with the retention by the Legislature in its own hands of the principle decision as to the policy of the law; and many of the Acts referred to go no further than this trifling delegation.

Speaking without any claim to precision, because I have not thought myself bound to go through the list, I venture to affirm that not more than two or three of these instances can be at all classed in importance, and in departure, as I view it, from the statutory powers of the Government of India to legislate, with the present one; and, as the questioning of such assumptions of power is matter of accident not originating with the Courts, no argument can be founded on their having hitherto passed unnoticed by the Judges. With Parliament, of course, the case is widely different. The sovereign Legislature intervenes when and as it pleases, of its own motion or impelled thereto from outside; and if any consent could be inferred from the silence of Parliament, the Courts would be con-

cluded. But, on such a topic as this, I do not think that we are bound to presume the knowledge of Parliament, or that it would be safe to draw so important an inference from its silence.

It cannot be said that the practice under consideration has ever been free from doubts as to its legality. Judicial doubts on the subject were expressed in the case of *Biddle v. Tarriny Churn Banerjee* (1), to the decision in which case, so far as it went, we are bound to pay the highest respect, and we may feel tolerably certain that, if the matter had attracted the attention of Parliament, it would have been dealt with in a manner similar to that adopted in the 25th section of the Indian Councils Act, that is to say, the doubts would have been recited, and the practice legalized either for the past or for all time. I am unable, therefore, to assume even that Parliament was cognizant of, still less that it intended by silence to approve, the mode of legislation referred to.

Upon these considerations it seems to me that the notification of the Lieutenant-Governor, issued under authority of Act XXII of 1869, section 9, could not have the effect of putting an end to the jurisdiction of the High Court. I take it as clear that this Court had jurisdiction in the ~~the~~ Gajah and Jynteah Hills, because that was a jurisdiction vested in the Court of Nizamut Adawlut at the time of its abolition, and the result is that, *me jure* such jurisdiction has not been validly taken away, but still exists.

I wish now to say that, when I first committed to writing the views which I hold upon this very important question, I found myself to have arrived, by a nearly similar train of reasoning, at the same opinion which my brother MARKBY has expressed with fulness of treatment, and an amplitude of research to which I do not pretend. I might have adopted, perhaps, every word of that exhaustive judgment, but I thought it on the whole more respectful to the Government, as well as more satisfactory to myself, that I should indicate, however slightly the grounds of my own independent conclusion.

AINSLIE, J. —

By 3 and 4 Will. IV., c. 85, s. 43, the Governor-General in Council, had power to make laws and regulations for repealing,

(1) TAYLOR AND BELL, p. 409.

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amending or altering any laws or regulations whatever then in force, or thereafter to be in force, in the Indian territories of His Majesty of any part thereof, and to make laws and regulations for all persons and all Courts of Justice and the jurisdiction thereof, and for all places and things whatsoever throughout the whole and every part of the said territories, with certain reservations; and by section 45 all laws made *as aforesaid* were to have the force and effect of Acts of Parliament.

By 16 and 17 Vic. c. 95, s. 22, a provision was made for the better exercise of the powers of making laws and regulations by the addition to the Council of the Governor-General of certain persons as Legislative Councilors, and by section 23 it was enacted that the powers of making laws or regulations vested in the Governor-General in Council should be exercised only at meetings of the said Council at which a certain number of members and certain particular members should be present.

By 24 and 25 Vic. c. 67, s. 2, the 43rd section of the Act of William IV., and the 22nd and 23rd sections of the Act of 16 and 17 Victoria, are repealed, but the 45th section of the former is maintained in force, save so far as the same may be altered by or be repugnant to this Act.

Sections 9 and 10 provide for the constitution of a Legislative Council, and section 15 restricts the power of making laws and regulations to meetings of the Council at which a certain proportion of members is present; by section 6 the Governor-General alone is authorized, in certain cases, to exercise all the powers of the Governor-General in Council *except the power of making laws and regulations*.

Section 22 re-enacts the provisions of section 43 of the Act of William IV. with the addition that the power is capable of being exercised at meetings of Council for the purpose of making laws and regulations, at which by section 19 no other business can be transacted, and except at which by section 15 no laws or regulations can be made.

Section 25 validates certain laws and regulations theretofore made otherwise than at meetings of a Legislative Council in respect of the Non-Regulation Provinces.

By section 23, the Governor-General, in cases of emergency

may make ordinances for the peace and good government of the Indian territories of Her Majesty or any part thereof, to have effect for six months only, and subject to be controlled or superseded by a law made at a meeting of the Legislative Council.

Sections 34 and 45 restrict the power of making laws and regulations conferred on Subordinate Legislatures, so that, as in the case of the Council of the Governor-General, it can only be exercised at a meeting for the purpose of making laws and regulations, and in no case can they modify Acts of the Imperial Parliament.

The first section of 33 Vic., c. 3, provides that, in respect of any part of the territories under the government or administration of any Governor, Lieutenant-Governor or Chief Commissioner, to which the Secretary of State shall from time to time by resolution declare the provisions of the section to be applicable, the Governor, Lieutenant-Governor or Chief Commissioner, as the case may be, may propose drafts of regulations for the peace and good government of such parts to the Governor-General in Council, which, on receiving his assent, and being duly published, shall have the force of *laws made at a meeting of the Legislative Council*.

There is further provision in 17 and 18 Vic., c. 77, s. 3, by which the Governor-General in Council (with the sanction of the Court of Directors of the East India Company) could, by proclamation, take under the immediate authority and management of the Governor-General in Council any part of the territories under the government of the East India Company, and thereupon could give all necessary orders and directions respecting the administration of such part, or otherwise provide for the administration of the same; but this is coupled with a proviso that *no law in force at the time in such part should be altered or repealed, except by a law made by the Governor-General in Council*.

The Imperial Parliament has thus carefully declared the mode in which legislation by the Government of India is to be carried on. Ordinarily it is to be by laws made at meetings of the Legislative Council of the Governor-General; under emergencies and for the limited term of six months by the Governor-General alone; and in respect of particular places, to be defined by the Secretary of State, by the Governor-General in (Executive) Council on the proposal of the Local Government.

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When Act XXII. of 1869 was passed, the last provisions had not come into existence. This Act was passed by the Governor-General in Council under the general powers conferred by section 22 of the Indian Councils Act, subject to the limitations specified in that section.

The question is, whether the Supreme Indian Legislature did itself, directly or by necessary implication, exclude the Cossyah and Jynteah Hills from the territorial jurisdiction of the High Court? I confine myself to this one matter, which is all that we need consider for the purposes of the appeal before us at the present stage of the proceedings. I understand we are all agreed that such exclusion is within the powers of the Legislature.

I think it did not do so, but that it left the question of such exclusion unsettled. The preamble and title of the Act speak only of the Garo Hills; the Cossyah Hills are not mentioned until section 9 is reached, except that in section 3 it is said that, from the date of the notification provided for in section 2, Act VI. of 1835 (so far as it relates to the Cossyah Hills) shall be repealed.

With this exception the first eight sections refer exclusively to the Garo Hills. Then comes the 9th section, which empowers the Lieutenant-Governor, from time to time, by notification in the *Calcutta Gazette*, to extend all or any of the provisions of the other sections to the Jynteah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British territory.

This provision for a separate notification makes it clear that no part of the territory mentioned in section 9 is affected by the Act in consequence of the notification provided for in section 2; and that, if the Act has any operation there, it is simply as the result of the will of the Lieutenant-Governor. The repeal of so much of Act VI. of 1835 as affects the Cossyah Hills from the date when the Act came into force in the Garo Hills (namely, the 1st March, 1870) is of no practical importance; this much of the Act was wholly obsolete. The Courts of Sudder Dewanny and Nizamut Adawlut, to which powers of superintendence had been given by the Act, had ceased to exist; and, by the 9th section of the High Courts Act (24 and 25 Vic. c. 104), this Court had been vested with the same powers that the former Courts had

That the Government of India in Legislative Council should take the opportunity of repealing this obsolete Act at the same time that it was dealing with the law applicable to the Garo Hills is not to my mind sufficient ground for saying that the Legislature, in September, 1869, made a declaration in respect of the Jynteah, the Naga or the Cossyah Hills similar to that which it had made in respect of the Garo Hills. As to these last, certain provisions were absolutely enacted, and all that was referred to the Lieutenant-Governor was to fix a day from which they should take effect.

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The preamble declares the expediency of dealing with the Garo Hills, but says not a word about the others. The notification necessary to start the operation of the Act in respect of the Garo Hills has no effect in the Cossyah and other hills. Whether or not the Act shall ever come into operation at all in the latter, and if so, the extent to which effect shall be given to it, is left entirely to the discretion of the Lieutenant-Governor. The 2nd and 6th sections are not framed in the same form. The first directs that the Act shall come into operation, and that the Lieutenant-Governor shall fix a date of commencement, and merely leaves the particular date to be determined by the Lieutenant-Governor as is commonly done when the introduction of a new law requires some adjustment of the administrative machinery.

The fixing of such date is a ministerial, not a legislative, act; but the determination whether the law shall be applied at all, is not a ministerial, but a legislative, act. As this determination was not arrived at by the Supreme Legislature, but was remitted to the discretion of the Lieutenant-Governor, it cannot be said that the Legislature excluded the Cossyah and Jynteah Hills from the jurisdiction of the High Court; it went no further than to say that, if at any time the Lieutenant-Governor shall think fit to exclude them, he may do so. In fact, the Lieutenant-Governor did not avail himself of the power for two years after the passing of the Act, whereas he issued the notification under section 2 within five months from that time, and it rested entirely with him to determine whether he ever would avail himself of it, and if so in what district and to what extent. He might possibly have determined only to apply the provisions of section 5, relating to the

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public revenue and rent, and of section 7, as cesses, in one tract, while he applied the whole law in another. The Supreme Legislature could have no knowledge beforehand of what would be the results of the passing of the Act. It certainly cannot be said that the four hill tracts named in the Act were all in the same condition at the date of the passing of the Act of 1869, so that what was good law for one was necessarily applicable to the others, if this had been so, the frame of the Act would have been different from what it is. If, then, it was uncertain whether the jurisdiction of this Court in the Cossyah Hills would ever be taken away at all, it cannot be held that it was actually taken away by the Supreme Legislature in the Act of 1869; and that all that was left to the Lieutenant-Governor was to make arrangements accordingly, and to fix a date for the commencement of the operation of the Act.

It is consequently necessary to ascertain whether the delegation of power to the Lieutenant-Governor to remove the Cossyah and Jynteeh Hills from the jurisdiction of this Court by a legislative declaration was within the powers of the Legislative Council. On this point, the language of section 22 of the Councils Act appears to me to leave no doubt.

Power is given to the Governor-General in Council at meetings for the purpose of making laws and regulations to alter any laws, and make laws for all persons, places and Courts of Justice in the Indian territories of Her Majesty: provided, *inter alia*, that such laws shall not in any way affect any of the provisions of the Councils Act.

The law under consideration is a law made undoubtedly at a meeting of the Legislative Council of the Governor-General, and so far a good law; and if it does not fall within one of the seven exceptions specified in section 22, it has, by the 45th section of 3 and 4 William IV., c. 85, all the force and effect of an Act of Parliament; but, if it does fall within one of those exceptions, this last-mentioned enactment gives it no force at all. Section 22 of the Councils Act having been substituted for the earlier provisions on the same subject (3 and 4 Will. IV., c. 85, s. 43, as modified by 16 and 17 Vic. 95, s. 23), the words of section 45—"all laws and regulations made as aforesaid"—only apply to

laws properly made under section 22 of the Councils Act, are not within one of the exceptions.

The Act of Parliament requires that, ordinarily, all laws shall be made only at a meeting of the Council of the Governor-General held for the sole purpose of making laws and regulations, and at which certain persons are present.

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When laws are to be made otherwise, there is a specific provision according to the nature of the case, but these exceptional provisions are made by Parliament itself, and not left to the discretion of the Indian Legislature; and it is and has long been an established rule (section 70, 3 and 4 William IV., c. 85, and section 6, 24 and 25, Vic., c. 67) that the Governor-General himself shall not by himself, except when specially authorized by Parliament, exercise the power of making laws and regulations. It would not be possible for the Legislative Council validly to divest itself of its own functions, and transfer them to the Governor-General alone. A law to such effect made by the Council would violate the provisions of both section 6 and section 15, whether that law purported to vest the Governor-General with legislative powers generally, or specially, and would therefore, under the express words of section 22, be *ultra vires*. But, if this is so as to the Governor-General, surely it must be so as to the Lieutenant-Governor of Bengal. The same reasons which apply in the one case for restraining the highest officer of the Crown in India from exercising legislative powers alone, and for entrusting those powers only to a Council to be exercised at a meeting at which not less than a certain number of members shall be present, must apply with more force to a subordinate officer; and section 15 is as much violated in one case as in the other.

Therefore, in my opinion, the conferring on the Lieutenant-Governor power to remove the Cossyah Hills from the jurisdiction of this Court was *ultra vires*.

If it was *ultra vires*, this Court is bound to take notice of the fact. The power formerly exercised by the Nizamut Adawlut in this tract of country was given to this Court by Act of Parliament (section 9, 24 and 25 Vic., c. 104); and, unless it has been validly taken away, we are bound to exercise it.

No doubt, the Governor-General in Council, whatever construc-

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tion be put on the section referred to, has power to put an end to this Court's jurisdiction in this tract of country, but no other authority in India can do so. But, if the Governor-General in Council wishes to do it, he must proceed by the exercise of his legislative powers as created or declared by the Councils Act, and in no other way. The High Courts Act provides no new mode of legislation, but makes the jurisdiction of the High Courts subject to the legislative powers of the Governor-General in Council, which must be looked for elsewhere. If he shall proceed in any other way, this Court is constrained by the Act of Parliament to continue the exercise of its jurisdiction.

But it is said that this view of the provisions of section 22 of the Councils Act is at variance with that taken through a long course of years, as shown by a series of enactments in which a somewhat similar mode of supplementing the action of the legislative Council has been adopted.

I think it unnecessary now to express any opinion as to the validity of the Acts referred to. Assuming them to have been validly enacted, their existence does not support the argument that the mode of legislation adopted in Act XXXII. of 1859 is only that which has been constantly adopted without objection; and that as it cannot be assumed that this mode of legislation has escaped the observation of the Imperial Parliament, it has the warrant of a tacit approval.

It appears to me that a distinction must be drawn between provisions by which the carrying out of the declared decisions of the Supreme Legislature is furthered, and provisions which give a power to act independently of the discretion of the Council of the Governor-General. As an example of the former, I may take section 385 of Act VIII. of 1859 or section 445 of Act XXV. of 1861. These are laws intended to be eventually of universal application in British India (the latter re-enacted in Act X. of 1872 is now, with very few exceptions, the only law on the subject); the actual introduction of these enactments was, in certain tracts of country, postponed and made to depend on the discretion of the Local Government. The Supreme Legislature had considered these laws, and adopted them as laws to be eventually in force everywhere; but, instead of declaring that they were to take effect

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everywhere at once, it was content to declare the ultimate law and leave the Local Governments to advance up to this standard as fast as they conveniently could. When a Local Government declared such a law to be in force, it was merely parting with a power of delay conferred upon it; it did not make any law; the law introduced was the law made by the Governor-General in Council with the express intention that it should become the law of the particular tract of country in due time. But Act XXII. of 1869 does not stand on precisely the same footing. There was no expression of a determination by or desire of the Legislative Council that eventually the Jynteah Hills, the Naga Hills and the Cossyah Hills should be reduced to the same condition as the Garo Hills; at the most it can only be said that there was an expectation that such a measure might become necessary; but an attempt to provide beforehand for the contingency of such a state of things arising in the former, as then warranted the introduction of the measure into the Garo Hills, does not amount to a determination that this was the law which it was desirable to put into force in all these hill tracts; had this been the intention of the Legislature, I should have expected it to have been expressed in plain language.

The provisions of section 39, Act XXIII. of 1861, do not affect my view of this matter. This section allows a Local Government, with the previous sanction of the Governor-General in Council, to annex any restriction, limitation or proviso it may think proper when extending the Code of Civil Procedure to any territory not subject to the general regulations; but this is merely another form of delaying the full extension of the Code. So far as the Code obtains operation, it is still—because the extension is *pro tanto*—a carrying out of the intention of the superior Legislature that this shall be sooner or later the law in the particular tract of country. As I read the section, no power is given to amend the law itself: it is only a power to keep some portion in abeyance, or to make its operation contingent on something external to it, which again is only another form of postponing its full operation.

A very large number of the Acts referred to in the Schedule submitted to us of Acts containing delegation of powers is of the same character. The subject of many is limited, but the mode of legislation is substantially the same. The general law on each

1877 subject is propounded by the Legislature, the gradual application
 BURA of it is entrusted to some authority named in the Act. In form
 HANGSHU AND it may be that the law is made for one or more named members
 BOOK SINGH of a class with power to extend to others; but, in effect, this is
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 Judgment. Government to introduce it more or less rapidly as may seem fit.
 AINSLIE, J. The distinctive feature, in my opinion, is that in each of these
 cases the law is constructive by addition to, or remodelling of,
 the Statute law then existing as to each class of subjects under
 the directly-exercised discretion of a legislative body; whereas
 Act XXII. of 1869, as far as we are now concerned with it, is
 destructive, and operates merely to terminate the operation of
 established laws.

There is another class of Acts in which there is apparently a
 clear delegation of legislative power. I refer to Acts which
 contain a provision giving power to make rules or bye-laws,
 and to impose taxes or fix fines and charges, but these are
 clearly distinguishable from such an Act as Act XXII. of 1869,
 so far as we are concerned with it now, namely, so far as
 it gives power to the Lieutenant-Governor to repeal section 9 of
 24 and 25 Vic. c. 104. Whether the powers conferred in these
 Acts to make rules and bye-laws can in all cases be defended is
 a matter I need not discuss.

All legislation of this class is subordinate to, and in furtherance
 of, the defined object of each particular Act.

The case of *Biddle vs. Tarriny Churn Banerjee* (Taylor and
 Bell, page 409, and again at page 479) is authority for holding
 that, while the validity of rules, which can be brought within the
 definition of ministerial acts, is undoubted, the validity of other
 rules, such as therein mentioned, namely, rules imposing a penalty
 directly, or granting power of compelling discovery, is open to
 grave doubt, if indeed the case does not go so far as to rule that
 they are absolutely invalid. It is foreign to my present purpose
 to discuss that case, it is enough to show that the delegation re-
 lied on does not stand unquestioned, and that there is very high
 authority for doubting its validity.

As I have referred to this case, I take the opportunity of
 observing that it seems to me strongly to support the earlier part

of my judgment. At page 406 the learned Chief Justice, Sir LAWRENCE PEEL, observes :—

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"The Legislature of India, though it possesses large legislative powers, is still a limited Legislature, and exercises a delegated authority of making laws. Independently of the territorial limits assigned to its power of making laws, there are other limits imposed which the Legislature must not exceed; and it is the province of the Courts of Justice of the country to decide on the legality of Acts of the Legislature, if a suit be instituted to decide whether the Legislature has or has not exceeded the limits within which it may legislate." Again, at page 479, as I understand the judgment, he assumes as undoubted that delegation of legislative authority by the Indian Legislature is beyond its powers, the question being in each case whether there has or has not been such delegation.

The Acts which are most analogous to the Act under consideration, so far as we have now to deal with it, are few in number; they have been termed deregulationizing Acts.

Act XXI. of 1845 was passed while the 3 and 4 Will. IV., c. 85, was in force; the power of legislation was then vested in the Governor-General in Council. This Act does not make any transfer of that power, but simply declares that the same authority in which the legislative power vested, *viz.*, the Governor-General in Council, may by an order in Council do certain things. The same remarks apply to Acts VI. and XI. of 1846.

After the passing of 16 and 17 Vic., c. 95, we come to the Sonthal Districts Act, XXXVII. of 1855. This differs in form from Act XXII. of 1860, and is distinctly a legislative declaration by the Governor-General in Council. The Lieutenant-Governor has, by section 6, to give effect to it by proclamation, but this obviously is a merely administrative action. The power to allow an appeal in clause 1, section 4, notwithstanding the declaration in that section that all decisions and sentences passed according to the provisions of the Act are final, is a power to relax the stringency of the Act in the direction of the general law.

The Chittagong Hill Tracts Act, XXII. of 1860, approaches in some respects more nearly to the form of the Act under consideration. Whether any of its provisions are open to question is

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beyond the scope of my present enquiry. So far as the abolition of the jurisdiction of the Courts of Civil and Criminal Judicature is concerned, the direct and undoubted authority of the Governor-General in Council has been exercised. In the Rohilkund Act, XIV. of 1861, there is a slight change of form. While the Supreme Legislature makes a direct declaration in respect of certain tracts specified in the Schedule, it gives power to the Lieutenant-Governor, North-Western Provinces, to define the portions of Pergunnahs Juspoor and Kashipore in the District of Moradabad, which are to be subject to the Act, but it does not give him power to include these Pergunnahs or not at his pleasure, and at such time as he may think fit. There is no provision for more than one proclamation giving effect to the Act. This Act approaches to, but does not reach the form of, Act XXII. of 1869.

Act XXIV. of 1864 is wholly different; it validates rules previously made. As far as it empowers the Local Government to extend any regulation or Act then in force, it may be said to give legislative power; but this is not such a power as is now in question, and whether such powers have been rightly or wrongly given is a matter on which I express no opinion.

On the whole, then, I am of opinion that the jurisdiction of this Court in the Cossyah and Jynteeah Hills has not been validly taken away, and that we are bound to entertain the appeal.

MARKBY, J. MARKBY, J. :—

Two persons, Bura and Book Singh, have been convicted on a charge of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills, and sentenced to death. The sentence was commuted to transportation for life by the Chief Commissioner of Assam on the 23rd April, 1876.

On the 9th July, 1876, the officer in charge of the Kamrup Jail forwarded to this Court petitions of appeal from these prisoners, unaccompanied by copies of the judgment.

The first question which arises in the case is, whether the High Court has any power to entertain these applications; and this question is one of so much importance that it has been referred to a Full Bench, and has been on two occasions very fully argued.

The Cossyah and Jynteeah Hills comprise a considerable tract of

country on the eastern frontiers of Bengal, and they contain a population which, in 1862, was estimated at 120,000. The Jynteeah Hills were formerly under the independent Rajah of Jynteeah. The Cossyah Hills were divided into a number of smaller districts, under different rulers. Of the twenty-five Cossyah States, five used commonly to be called "semi-independent", and the remaining twenty "dependent." It is not very clear how this division was arrived at, and it probably has never been accurately ascertained what part of the Cossyah Hills is, and what is not, British territory. But by far the greater portion has long been subject to our Government, and is therefore (21 and 22 Vic., c. 106, s. 1) included in British India.

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Prior to 1854, there was a Political Agent of the Cossyah Hills, who exercised the usual powers of a Political Agent with regard to so much of the territory as was under chiefs who were treated as independent; but he also held general powers for the administration of justice in those portions of the territory which had ceased to be independent. Probably, in practice, the difference was of no very great importance, the chiefs being all too insignificant to assert any independent authority.

This officer was in command of the Sylhet Light Infantry, and he acted also as the Political Agent in respect of Jynteeah, which, up to the period of the Burmese War in 1824, was independent. During that war the Jynteeah territory was taken under the protection of the British, and the Rajah acknowledged his allegiance. In 1835, the reigning Rajah was deposed for an act of cruelty, and his territory was annexed. From the date of this annexation the Political Agent of the Cossyah Hills seems to have exercised the same functions with regard to Jynteeah as he had hitherto exercised in respect of the annexed portions of the Cossyah Hills. But he still continued to bear the somewhat inappropriate designation of Political Agent of the Cossyah Hills.

In the year 1835 an Act was passed (Act VI. of 1835) by which the functionaries in political charge of the "Cossyah Hills" were placed under the control and superintendence, in criminal matters, of the Court of Nizamut Adawlut.

From the records of this Court it appears that, on the 16th June, 1835, the Court informed the Government of Bengal that the

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Political Agent of the Cossyah Hills had submitted returns of criminal business for Jynteeah also. The Government replied that the Jynteeah territory was taken possession of on the 15th of March, whilst the Act was passed on the 13th, and that, if the Court thought that this did not constitute any objection to their doing so, the Government saw no objection to the Court exercising jurisdiction in Jynteeah, which was accordingly authorised. The Court replied, accepting the jurisdiction in Jynteeah from the date of the Act.

The arrangement of the duties of the Political Agent of the Cossyah Hills remained, as above stated, until 1854, when an order was issued by the Governor of Bengal (1st March, 1854) to the Commissioner of Assam, communicating his determination to separate the civil functions of the Political Agent in the Cossyah Hills from the command of the Sylhet Light Infantry, and to vest the former in an Assistant Commissioner subordinate to the Commissioner of Assam, "precisely on the same footing as the other principal assistants in the Province of Assam." The order also intimates that the officer to be appointed would be called "Principal Assistant in charge of the Cossyah and Jynteeah Hills."

From that time the Cossyah and Jynteeah Hills, though never formally annexed to the district of Assam, seem to have been treated as part of Assam. All the criminal appeals which in Regulation Provinces would go to the Sessions Judge went to the Deputy Commissioner of Assam, and were apparently disposed of by him in the same manner as any other criminal appeals in Assam.

In the year 1862, the jurisdiction which had been exercised by the Nizamut Adawlat was transferred to the High Court upon its creation by Her Majesty's Letters Patent.

The Code of Criminal Procedure was extended to Assam by a notification of the Lieutenant-Governor of Bengal, published in the *Gazette* of 16th November, 1862; and, though never expressly extended, (as far as I have discovered) to the Cossyah and Jynteeah Hills, it was considered to be in force in that district without any farther notification; and this it would be if the view that this district was made a part of Assam were correct.

In the year 1866, the Assistant Commissioner convicted a prisoner, named U. Don Dolloi, of an offence under section 504

of the Indian Penal Code, and bound him over to keep the peace for one year after his release. On appeal to the Deputy Commissioner of the Cossyah and Jynteeah Hills, that officer confirmed the order; but this Court, upon a petition presented by the accused, altered the period for which the party was bound over.

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In the year 1869, the Deputy Commissioner of the Cossyah and Jynteeah Hills referred a sentence of death for confirmation by this Court under section 380 of the Code of Criminal Procedure. The sentence was confirmed, and the prisoner was hanged.

Under these circumstances there can be no doubt that this Court had at one time jurisdiction in the Cossyah and Jynteeah Hills. The only question, therefore, is, whether this jurisdiction has been taken away, and this renders it necessary to consider the recent legislation with regard to these districts.

By section 4 of Act XXII. of 1869 (which is called the Garo Hills Act), the Garo Hills are removed "from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code and the Acts passed by the Legislature now or heretofore established in British India, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid;" and it is provided that "no Act hereafter passed by the Council of the Governor-General for making laws and regulations shall be deemed to extend to any part of the said territory unless the same be specially named therein." By section 5 the administration of civil and criminal justice and the superintendence of the settlement and realization of the public revenue and of all matters relating to rent within the said territory are vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance, or of reference and appeal from time to time, appoint; and the officers so appointed are in the administration of justice to "be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue."

By section 9 the Lieutenant-Governor is empowered to extend all or any of the provisions of this Act to the Cossyah and Jynteeah Hills.

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By a notification in the *Calcutta Gazette* of 14th October, 1871, the Lieutenant-Governor did extend the provisions of this Act to the Cossyah and Jynteeah Hills, and he also directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. On the 30th July, 1872, rules were issued by the Lieutenant-Governor under sections 5 and 9 of Act XXII. of 1869, for the administration of justice and police in the Cossyah and Jynteeah Hills, in which no allusion is made to the High Court.

Shortly after this, another power, which had been conferred by Parliament upon the Governor-General in Council, was called into action with reference to these districts.

By proclamation of the 6th February, 1874 (see *Gazette of India* of 7th February), in exercise of the powers conferred by section 3 of Statutes 17 and 18 Vic., c. 77; the Governor-General in Council took some districts (now forming "Assam" and including the Cossyah and Jynteeah Hills) under his immediate authority and management, which districts were till then under the Lieutenant-Governor of Bengal.

On the same day, by another proclamation, the Governor-General in Council constituted Assam a Chief Commissionership.

By Act VIII. of 1874, after a recital that the Cossyah and Jynteeah Hills had been taken under the direct management of the Governor-General in Council, and had been made part of the Chief Commissionership of Assam, all the powers then vested in the Lieutenant-Governor of Bengal were (section 1) transferred to the Governor-General in Council, and the Governor-General in Council was empowered (section 2) to delegate to the Chief Commissioner all or any of the said powers, or to withdraw the said powers.

By Act XIV. of 1874, in which the Cossyah and Jynteeah Hills are specially named, Act XXII. of 1869 is repealed, and the Local Government is empowered (section 6) to appoint officers to administer criminal and civil justice, and to regulate the procedure of officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said

districts. And it is also declared (section 7) that all rules theretofore prescribed for the guidance of officers "for all or any of the purposes mentioned in section 6 and in force at the time of the passing of this Act shall continue to be in force unless and until otherwise directed." This Act, however, has not yet come into force in those hills, because as yet no notification under section 3 has been published.

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By Notification of the 16th April, 1874 (see *Gazette of India*, April 18th), the Governor-General in Council, under section 5 of Act XXII. of 1869, made certain alterations in the rules for the Cossyah and Jynteeah Hills published under the Notification of July 30th, 1872, by the Lieutenant-Governor of Bengal, and republished the rules. In these rules no mention is made of the High Court.

It thus appears that the jurisdiction of the High Court was certainly in existence until the passing of Act XXII. of 1869. The question, then, is, has this jurisdiction ceased by reason of that Act or by reason of any thing done by any person under that Act?

For the prisoners it is contended (1) that the jurisdiction of the High Court, as established by Parliament, cannot be wholly abolished by any authority in this country whatsoever; and (2) that, if there be any authority which can abolish the jurisdiction of the High Court, it is only the Governor-General in Council exercising legislative powers at a meeting for the purpose of making laws and regulations which can do this; and that in this case the assumed abolition was not by this authority, but by the Lieutenant-Governor of Bengal, acting under the powers given to him by Act XXII. of 1869, which powers, it is contended, were not validly conferred.

With regard to the first question, the jurisdiction of this Court in the Cossyah and Jynteeah Hills was a jurisdiction vested in the Nizamut Adawlut at the time of its abolition, and it thus falls within the 2nd clause of section 9 of the 24 and 25 Vic., c. 104. It is, therefore, in my opinion expressly made subject by that clause to the legislative powers of the Governor-General of India in Council, or (to use a phrase which is more convenient) to the Legislative Council of India.

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I have given fully my reasons for this construction of the High Courts Act in the case of the petition of Syed Feda Hossein, Indain Law Reports, Vol. I., page 431 (Calcutta Series), to which reasons I still adhere, and in which I understand the other members of the Full Bench substantially concur.

It is necessary, therefore, to consider the second objection taken on behalf of the prisoner. This objection is met by the Crown in three different ways: First, it is said that the Act of 1869 does itself actually take away the jurisdiction of this Court; secondly, that, even if it does not do so, it evinces a final determination of the legislative authority that this jurisdiction shall be taken away, and that it only leaves, to the Lieutenant-Governor to fix the exact date of the Act coming into operation—no discretion being vested in him as to whether the Act shall come into operation or not; thirdly, that, even if the Lieutenant-Governor be vested with a discretion to determine whether or not the jurisdiction of this Court shall be taken away, still there is nothing which renders such a delegation of authority illegal.

The first and second of the three propositions put forward on the part of the Crown depend upon what is the true construction of Act XXII. of 1869. The Act is a very peculiar one. It recites that "it is expedient to remove the Garo Hills from the jurisdiction of the Civil, Criminal and Revenue Courts and offices established under the General Regulations and Acts, and to provide for the administration of justice and the collection of revenue in the said territory." The Act is to be called "The Garo Hills Act, 1869," and it is to come into operation "on such day as the Lieutenant-Governor of Bengal shall, by notification in the *Calcutta Gazette*, direct." Then by section 3, "on and after such day", that is to say, when the Act comes into operation in the Garo Hills, Act VI. of 1835, so far as it relates to the Cossyah Hills, is to be repealed. Then sections 4 to 8 deal exclusively with the Garo Hills, and section 9 gives the power already adverted to to extend all or any of the provisions of the Act to the Jynteah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British India. It is contended that section 3, which relates to the repeal of Act VI. of 1835, came into operation, so far as regards the Cossyah

Hills when the Lieutenant-Governor brought the Act into operation in the Garo Hills; that there was no discretion left as to bringing the Act into operation in the Garo Hills; and that, by the repeal of Act VI. of 1835, the jurisdiction of this Court, as created by that Act, was destroyed. Assuming, for the present, the correctness of the other parts of this argument, still, in my opinion, the last proposition is incorrect. When Act XXII. of 1869 was passed, the jurisdiction of this Court in the Cossyah Hills in no wise depended upon Act VI. of 1835. It depended upon the 24th and 25th Vic., c. 104, s. 9. Act VI. of 1835, in so far as it conferred jurisdiction upon this Court, was wholly obsolete. Moreover, as already shown, the jurisdiction of the Nizamut Adawlut was, after some discussion, extended to both the Cossyah and Jynteeah Hills, and the jurisdiction of the High Court, which is co-extensive, has been exercised in both tracts accordingly. But section 3 of Act XXII. of 1869 is expressly confined to the Cossyah Hills. The result, therefore, of this construction of Act XXII. of 1869 would be that, whilst it takes away our jurisdiction in the Cossyah Hills, it leaves it in the Jynteeah Hills. This is very improbable. Ever since the year 1835, both these tracts have been under one administration, forming the district of one Deputy Commissioner. The reason why the Legislature was desirous to get rid of the Act of 1835, at all events, is not perhaps at first sight quite obvious. But it was, I believe, as follows: As to that large portion of the Cossyah Hills which lies within British territory, the Act was, as I have said before, obsolete. As to any small portion of the Cossyah Hills if there should be any, which might be considered as not within British territory, the Act, though in terms applicable thereto, could not be enforced. It was, therefore, an Act which it was proper to repeal, so far as the Cossyah Hills were concerned, whether our jurisdiction remained or not. I am, therefore, clearly of opinion, notwithstanding the reference to the Cossyah Hills in section 3 and the repeal of Act VI. of 1835, that the Act of 1869 does not of itself take away the jurisdiction of the High Court, either in the Cossyah or in the Jynteeah Hills.

Nor do I think that the Act, taken as a whole, evinces a final determination on the part of the Legislature that the jurisdiction

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of the High Court shall be taken away. I will assume that, if it did so, there would be then nothing to prevent the operation of the Act. I will assume that the operation of an Act, complete in all its parts, may be suspended by the Legislature until something is done by an officer of Government. This might be considered merely as a method of promulgation, and not as any delegation of authority at all. It would be the same as if the Act had been directed to come into operation on its being printed at length in the *Calcutta Gazette*. If, therefore, this be the true construction of the Act, I am not prepared, as at present advised, to say that it could not operate. As regards the Garo Hills, the Act (always excepting section 8, which presents special difficulties of its own, which I need not now consider) may, I think, bear this construction. But, as regards the Cossyah and Jynteeah Hills, the Act cannot, I think, be so construed. The frame of the Act as to the Garo Hills and as to the Cossyah and Jynteeah Hills is entirely different. If the Legislature had had the same final intentions as to removing the Cossyah and Jynteeah Hills from the jurisdiction of the ordinary Courts as it may, I think, notwithstanding section 2, be considered to have had, in respect of the Garo Hills, the preamble of the Act would not have been limited to declaring the expediency of removing the Garo Hills only from the jurisdiction of those Courts. It would have declared the expediency of removing the Cossyah and Jynteeah Hills also. It is true that the preamble of an Act cannot limit the express words. But here the express words are in accordance with the preamble. The power to bring the Act into operation generally is conferred by section 2. The power to extend the Act to the Cossyah and Jynteeah Hills is given quite separately and in different language by section 9; and it is not a power to extend the Act simply, but to extend "all or any" of the provisions of the Act. The Lieutenant-Governor might, for example, have applied sections 6 and 7 to the Cossyah and Jynteeah Hills, but not section 4, in which case our jurisdiction would have remained as before. It cannot, I think, be said that a power of extension, so conferred, makes the Lieutenant-Governor the mere ministerial officer who is to promulgate the Act. It vests in the Lieutenant-Governor a double discretion: First, whether

the Act shall come into operation in the Cossyah and Jynteeah Hills at all; and, secondly, if so, what portion of it shall there operate. I do not mean to say that this is all the discretion vested by the Act in the Lieutenant-Governor. He may, by section 8, apply or not apply to these territories all or any portion of any law applicable to other parts of Bengal. But this portion of the Act is not now immediately before us. I am at present only considering section 9, and what discretion that section leaves to the Lieutenant-Governor as to the application to the Cossyah and Jynteeah Hills of section 4. Reading section 9 by itself, the discretion appears to me to be absolute. Reading the whole Act, I can find no words which can carry any further inference than this—that the Legislative Council, when it determined it to be expedient to remove the Garo Hills from the jurisdiction of the ordinary Courts, at the same time contemplated the possibility of its being expedient to remove the Cossyah and Jynteeah Hills from this jurisdiction also. But this they left an entirely open question to be decided by the Lieutenant-Governor of Bengal.

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It is not, of course, in any way necessary now to establish that there is no legislative discretion left to the Lieutenant-Governor as to the application of this Act to the Garo Hills. But it is, I think, desirable to show that the discretion (if any) under section 2 and the discretion under section 9 are wholly different, both in kind and degree. For this purpose, we may consider the matter in this way. It is just possible to conceive that the Lieutenant-Governor of Bengal might not choose to issue the notification under section 2, and that the Governor-General in Council might not choose to compel him to do so. The Legislature would then have been helpless; the Act would never come into operation at all; it would have wholly miscarried; and the intention of the Legislature would have been defeated. But would the intention of the Legislature have been defeated if the Lieutenant-Governor had given the notification under section 2, and had not extended section 4 of the Act to the Cossyah and Jynteeah Hills? I think not. In the one case the Legislature counted on the action of the Lieutenant-Governor as a certainty; in the other case

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they left him to act or not as he pleased. Then, again, the moment the Act came into operation by the issuing of the notification under section 2, the jurisdiction of the ordinary Courts in the Garo Hills was destroyed by the imperative words of section 4. But, even when the Act had been thus brought into operation, there is still not a single imperative word applicable to the Cossyah and Jynteeah Hills at all. Even then it is only said that the Lieutenant-Governor "may, from time to time, extend" to certain districts "all or any of the provisions of the Act." What ground is there for saying that the intention of the Legislature would have been defeated if the Lieutenant-Governor had declined to exercise any portion of these powers?

Another way of looking at section 9 was suggested in the course of the argument. It was said that section 9 might be looked at merely as dealing with a question of boundaries; that all the districts mentioned in the Act, the Garo Hills, the Cossyah and the Jynteeah Hills, and the Naga Hills, were conterminous; and that, in such wild and barbarous districts as these, it would be impossible for the Legislature to fix the exact limits of the application of the Act. I think this suggestion does not accord with either the geographical or the historical facts. Although the Garo Hills and the Cossyah and Jynteeah Hills and the Naga Hills are contiguous, they are three entirely separate districts. The Garo Hills belong to the Commissionership of Cooch Behar, the Cossyah and Jynteeah Hills and the Naga Hills to the Commissionership of Assam. The boundary between the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills is generally well defined. In point of size, the three districts are about equal, the Cossyah and Jynteeah Hills being rather the largest. The policy of the Government has always been to keep the Garo Hills out of the jurisdiction of the regular Courts, and these Courts have never established their jurisdiction in that district. On the other hand, the policy as to the Cossyah and Jynteeah Hills was to bring them under the ordinary jurisdiction of the Courts; and this jurisdiction was fully established and in action without inconvenience from 1835 up to 1871. The Garos are said to be wild and barbarous tribes whom

the Government in 1869 were still endeavouring to reclaim to the habits of civilized life. No such assertion, as far as I am aware, could be made with regard to the inhabitants of the Cossyah and Jynteeah Hills. The district is a peaceable one; the inhabitants of it carry on peaceful pursuits. There are within it two considerable European stations, one of which is the seat of the Local Government of Assam. There are also many Europeans living in the Cossyah and Jynteeah Hills, most of them in the service of Government, but some are settlers. The determination, therefore, to exclude the ordinary Courts of Law from the Garo Hills would depend upon considerations having no application whatever, or at least only a very modified application, to the Cossyah and Jynteeah Hills. Moreover, there was a special cause which led to the legislation of 1869 as regards the Garo Hills. There had been a decision of this Court which, in effect, decided that the Government had been wrong in treating certain portions of the Garo Hills as not within the jurisdiction of the ordinary Courts of Justice. It was to counteract the result of this decision that the Act of 1869 was passed. It was in effect an Act passed to legalize the *status quo*. But the same Act, when introduced into the Cossyah and Jynteeah Hills, instead of continuing a state of things already in existence, entirely revolutionized the long-established administration of the district. It threw back people who had been living for 35 years under a regular and settled administration according to established laws into a condition which every one would acknowledge to be only suitable to a people just emerging from barbarism, that is to say, a condition in which all the powers of Government were centred in the hands of a single individual. This may have been necessary. I do not presume to say that it was not so. But there is nothing in the frame of the Act of 1869, or the circumstances of the case, which would lead me to suppose that, simply because this was done in the Garo Hills, it was necessarily intended to be done in the Cossyah and Jynteeah Hills also.

I think, therefore, that the Legislature did not decide by Act XXII. of 1869 that in the Cossyah and Jynteeah Hills the jurisdiction of the ordinary Courts should be excluded; that it did not express any opinion whatsoever upon that question, but that

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it left the decision of it to the absolute and uncontrolled discretion of the Lieutenant-Governor

This being the view that I take of Act XXII. of 1869, it becomes necessary to consider whether it falls within legislative powers of the Governor-General of India in Council to delegate to the Lieutenant-Governor of Bengal the power of determining whether or no a particular district of British India shall remain subject to the jurisdiction of the High Court.

Now, in order to ascertain this, we must go back to that which is the root of the whole matter, the 24 and 25 Vic., c. 104, s. 9, which (as we are all agreed) alone makes the High Court subject to any legislative control in this country, and the question comes to this. When Parliament made the High Court subject to this legislative control, did it thereby intend to enable the Indian Legislative Council to transfer that control to another person, or did Parliament intend that that control should be exercised by the Legislative Council of India itself?

The argument that such a transfer of authority may take place, has been put by at least one of the learned Counsel, who argued this case for the Crown, on very high grounds. It is said that the legislative powers of the Governor-General of India in Council mentioned in section 9 of the 24 and 25 Vic., c. 104, are those legislative powers which are conferred by the Councils Act (24 and 25 Vic., c. 67), that, except as regards the seven heads specifically mentioned in section 22 of the latter Act, the Indian Legislature has a power co-equal with that of Parliament; that there is no restriction as to the mode of legislation; that the power of the Indian Legislature to delegate its authority is no more to be questioned than the power of Parliament to do the same; and that every possible and imaginable power of Parliament not specially excepted in the Councils Act is conferred. Stress was also laid on section 45 of 3 and 4 Will. IV., c. 85, which provides that laws made by the Indian Legislature shall have the same force as an Act of Parliament.

This question, although not, as I shall hereafter show, devoid of authority, has never been discussed at length, as far as I am aware, by any English Judges. The task of laying down the principles upon which such a high and important question is to be deter-

mined is an extremely difficult one, and I approach it with the greatest diffidence. But it is nevertheless one which in the present case I am bound to attempt.

Before proceeding to consider the general question, I will consider an argument which was addressed to us in order to show that the Courts of Law have no jurisdiction to enter upon a consideration of this question at all. It was said that, if there be any limits to the legislative powers of the Governor-General in Council, they are political limits, and not legal ones; and that the question I am about to consider is a political one upon which Courts of Law are not empowered to enter. All doubt upon this part of the case may, I think, be cleared up by a consideration of the difference between a sovereign or supreme, and a subordinate or restricted, Legislature. No one would contend that the Indian Legislature is itself sovereign. It exercises sovereign powers, but by delegation only, and is subordinate to Parliament. This is made clear by the 3 and 4 Will. IV., c. 85, s. 51, which is applicable to the present Legislative Council (see 24 and 25 Vic., c. 67, s. 2), and which reserves to Parliament the full power still to legislate for India, and to "control, supervise and prevent all proceedings and Acts whatsoever of the Governor-General in Council." And it is well known that Parliament does exercise a control as regards the affairs of India which it does not exercise in any other dependency of the British Crown. The Indian budget is annually laid before Parliament. Indian questions are frequently there debated on; and enquiries are constantly being there made by committees and otherwise into the conduct of affairs by the Government of this country. Now, the reasons why Courts of Law cannot examine the validity of Acts passed by a sovereign or supreme Legislature have no application whatsoever to the Acts of a subordinate or restricted Legislature. Of course, within its competency, the Acts of a subordinate or restricted Legislature are, to use the expression of Chancellor KENT, "as absolute and uncontrollable as laws flowing from the sovereign power" (Kent's Com., p. 448); and I may remark in passing that this explains how it is that the Acts of the Indian Legislature, if duly authorized, come to be equivalent to Acts of Parliament. But the question, whether the Act is or is not within the compe-

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tency of the Legislature, must, as the same learned author points out, of necessity fall within the province of Courts of Law to determine. The same principle was laid down by the Supreme Court of the United States in a case quoted by Chancellor KENT at page 453. There the Chief Justice points out that the powers of the Legislature are in America (as they are in India) defined and limited by a written Constitution; "but", he proceeds to say, "to what purpose is that limitation if those limits may, at any time, be passed? The distinction between a Government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if Acts prohibited and Acts allowed are of equal obligation.. * * *

* * * The theory of every Government, with a written Constitution forming the fundamental and paramount law of the nation must be that an Act of the Legislature repugnant to the Constitution is void. If void, it cannot bind the Courts, and oblige them to give it effect, for this would be to overthrow in fact what was established in theory, and to make that operative in law which was not law. * * * If the Constitution be superior to an Act of the Legislature, the Courts must decide between these conflicting rules; and how can they close their eyes on the Constitution, and see only the law." In order properly to understand these observations, and to apply them to the present case, it must be borne in mind that the words "constitution" and "constitutional", as here used, do not mean precisely the same thing as with us, and the distinction is most important, as upon its due observance depend the exact limits of the competency of Courts of Law to enquire into the validity of the Act of a subordinate Legislature. The Parliament of England, although absolutely sovereign and supreme, is restricted by limits which are called constitutional; and we speak of certain principles of the English Constitution as being inviolable. But Parliament, being in the eye of the law absolute, can do that which a subordinate Legislature cannot do. It can, in the eye of the law, by its own ordinary proceedings, alter the Constitution. The proceedings, therefore, of Parliament can never be questioned upon constitutional grounds by Courts of Law. The constitutional restriction has, *ex hypothesi*, been already cut away by paramount

authority before the question arises. But not so where there is a written Constitution issuing from an authority superior to that of the Legislature whose functions it defines. There the constitutional restrictions always operate until the superior authority has removed them, and the Courts of Law are bound to give effect to them. Moreover—which is most important, as showing that the question to be decided is, in the strict sense of the word, a legal and not a political one—the restrictions here, as in America, exist in a written form, so that the only question the Court has to determine is the ordinary one: What was the intention of the sovereign power when it created the subordinate Legislature? I desire it to be fully and clearly understood that I treat this as an ordinary question of construction of an Act or Acts of Parliament, and I do not intend to enter into any political considerations whatsoever.

I also desire to say that I in no way countenance the doctrine which has been put forward by some eminent authorities, but which I believe to be now exploded, that Courts of Law can question the validity of Acts of the Legislature upon general considerations of religion, morality, natural justice, the so-called social contract or other similar grounds. I have repudiated this doctrine already in the case of the Queen *vs.* Ameer Khan, 6 B. L. R. 482, and I do so again. Where an Act has once been passed by a Legislature which is supreme, I consider it to be absolutely binding upon Courts of Law. Where it is passed by a Legislature, the powers of which are limited, it is not the less binding, provided it be not in excess of the powers conferred upon the limited Legislature. I may seem to some persons to be here repeating mere truisms, but I know by experience how much one is liable to be misunderstood when speaking upon such subjects as these.

Being, therefore, of opinion that it is not only within our power, but that it is our duty, to say whether the authority given to the Lieutenant-Governor to take away the jurisdiction of this Court was validly conferred, I proceed to consider the general and important question, whether the Councils Act enables the Legislative Council of India to transfer to others the powers which Parliament has conferred upon itself.

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Now, what is the broad principle generally applicable to all cases where an authority is given to one person to do acts on behalf of another, which authority involves personal trust and confidence in the agent, and is to be exercised by him in a particular manner? It will, I think, be admitted that the agent is bound himself to perform the acts for which he is authorized according to the manner indicated; and that he cannot transfer to others the confidence reposed in himself. No doubt, this principle has been generally laid down with reference to dealings between private individuals, but it appears to me to be equally applicable to the case of public functionaries. Parliament has said that the Governor-General of India, together with certain other specified persons, whose qualifications are mentioned, may make at meetings duly constituted laws for the people of India. To that extent it has delegated its own sovereign authority to the Indian Legislature. But, undoubtedly this delegation of authority was made in view of the special qualifications of the persons in whom this power is reposed, and of the safeguards which arise from the publicity and deliberation of the proceedings of a legislative body which can only transact business at meetings duly convened and constituted. Did Parliament intend to be itself the sole judge of what persons were thus qualified, and what safeguards were necessary for that purpose; or did it intend to leave to the Legislature here the power to substitute any persons whom they might consider sufficiently well-qualified, and any safeguards which they might consider sufficiently effectual? That is the question we have to decide.

The only ground upon which, as it appears to me, it can be maintained that the Indian Legislative Council may transfer to others the powers entrusted to itself is the broad and general ground upon which it was placed by the learned Standing Counsel, Mr. Kennedy, who argued with great force and ability that the power to do this is involved in the power to make laws. It was pointed out that there is a difference between a general power to make laws, and a particular power—for example, to grant a lease or to execute a deed. If I give a man a power to execute a deed, and he transfers that power to some one else, he has done something clearly not authorized by the power which was restricted to the single act of executing a deed. But, where Parliament has con-

ferred upon a Legislature the general power to make laws, the only question can be: Is the disputed Act a law? If it is, then it is valid, unless it falls within some prohibition. I think that this argument is sound, and that it must be met if the validity of Act XXII. of 1869 is denied.

Now, first, as to this Act being a law, I am clearly of opinion that it is not a law in the proper sense of the word. I am at present only speaking of the Act so far as the Cossyah and Jynteeah Hills are concerned. As to those hills, in the view that I take of it, this Act commands no one to do, or to forbear from doing, anything. It is simply a signification that a particular person may, in those hills, either do or not do certain things as he likes. That is not a law in the ordinary acceptance of the word. I will not take the definition of law as given by so accurate and precise a writer as Austin, since it may perhaps be objected that his views cannot be applied to British Acts of Parliament. But no one will make this objection as regards Blackstone, and how do we find that Blackstone defines a law? He says a law "is that rule of action which is prescribed by some superior, and which the inferior is bound to obey" (Vol. I., p. 38). Tried by this test, Act XXII. of 1869 is not a law. I need not here advert to the distinction between substantive and adjective law, the ultimate object of both being the same; nor do I say that amongst the multitudinous varieties of meaning which have been attributed to the term law, a mere permission to legislate could never be called a law. Any authoritative expression of intention might, by some persons under some circumstances, be called a law. But, when a Legislative Council was constituted in India distinct from the Executive Council, with power to make laws at meetings held for the purpose, I think it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative, that is, to the making of laws which (to use Blackstone's expression) are rules of action prescribed by a superior to an inferior, or of laws made in furtherance of these rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body, and many of its Acts are not laws according to Blackstone's definition, though, as being authoritative expressions of

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1877 intention, they might be sometimes so called. The Indian Legisla-
 BURA tive Council cannot, in my opinion, do all that Parliament can
 HANGSEH AND do, even where there is no express prohibition. The powers con-
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 THE QUEEN. cutive and the Legislative Councils. The Executive Council
 Judgment. alone has the superintendence, direction and control of the
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 nue of India (3 and 4 Will IV., c. 85, s. 39). The Legisla-
 tive Council has the power of making laws only. In England
 also, no doubt, as in India, the executive functions of Government
 are generally exercised by a body distinct from Parliament, by
 what (in a special sense) is called "the Government", but there
 is no legal impediment to Parliament taking upon itself executive
 functions, and the executive authorities are all responsible to
 Parliament for the way in which they exercise their executive
 powers. Indeed, to some extent, Parliament does exercise purely
 executive functions, as, for example, when it fixes the amount of
 the naval and military forces, or appropriates the public revenues.
 The difference in India is this. That the Executive Council and
 the Legislative Council are two co-ordinate and independent
 bodies, each having its own separate functions with which the other
 cannot legally interfere. For these reasons I think that the
 Legislative Council, when it merely grants permission to another
 person to legislate, does not make a law within the meaning of
 the Act from which it derives its authority.

I have discussed this question with reference only to the word
 "laws." The Act of Parliament uses the expression "laws and
 regulations." No reliance was placed in the argument on the use
 of the additional word, and I think myself that it is merely
 redundant.

But I quite admit that, in order fully to appreciate the powers
 of the Indian Legislature, we must not fasten our attention solely
 upon the meaning of a single word. We must look to the whole
 Act, and gather from it what were the intentions of Parliament
 in this respect. Indeed, we must look further. In order properly
 to understand the frame and intention of the Councils Act, we
 must consider the whole action of Parliament with regard to
 legislation in India from the year 1833 down to the present

time. In the year 1833, by the 3 and 4 Will. IV., c. 85, s. 43, the Governor-General in Council was empowered to make laws and regulations. Under this Act there was but one authority in India. "The Governor-General of India in Council." There was not, as now, a separate Council for making laws and regulations. But by section 48 all laws and regulations were to be made at some meeting of the Council at which the Governor-General and at least three of the ordinary members of Council were assembled; and at which alone the legal member of Council (as he was called) was entitled to vote. By section 70, the Governor-General in Council was expressly permitted to authorize the Governor-General alone to exercise all the powers which might be exercised by the Governor-General in Council, except the power of making laws and regulations.

From this time nothing occurred, as far as I am aware, to affect the constitution of the legislative authority in India, until the year 1853, when, by the 16 and 17 Vic., c. 95, the constitution of the Legislative Council was entirely altered by the addition of members who did not belong to the Executive Council. A distinction between the legislative and executive functions of Government is observable in the Act of Will. IV., but this Act puts the distinctions upon much clearer ground. It puts those functions into the hands of two separate bodies. Owing to the power which the Executive Government has over the appointment of members, and for other reasons, its influence in the Legislative Council is still supreme. But the change in the constitution of the Legislative Council introduced by this Act is nevertheless of importance as emphasizing the distinction between legislative and executive functions. There is also no doubt that henceforth a conflict of opinion between the Executive and Legislative Councils was, theoretically at any rate, no longer impossible.

In the next year, Parliament, by the 17 and 18 Vic., c. 77, granted to the Executive Council power to take any district under its own immediate authority, and to give all necessary directions respecting the administration of such districts, or otherwise to provide for the administration thereof: provided always that no law or regulation should be altered, except by law

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1877 made by the Legislative Council. This power to issue orders and
 BURA directions is, no doubt, to some extent, a legislative power, and the
 HANGSRAH AND Act shows how very cautiously provision was made by Parlia-
 BOOK SINGH ment for a change in the legislative machinery in India. It is to
 v. be observed also that this very limited power is conferred, not
 THE QUEEN. upon the Legislative Council, but upon the Executive—a pecu-
 Judgment. liarity which, as we shall see, is preserved through all the Acts of
 MARKEY, J. Parliament relating to this subject.

The next Act is the Councils Act. That Act re-confers the general power of making laws and regulations for the whole of India upon a Legislative Council somewhat differently constituted from what it had been previously, but which is to be quite distinct from the Executive Council. The Act provides how the members of the Legislative Council are to be appointed; how they are to resign their offices; and, for the validity of Acts, notwithstanding certain defects in the constitution of the Council, it declares that the power of making laws shall be exercised by the Council only at meetings duly constituted in the manner directed by the Act; it provides how meetings of the Council are to be convened and adjourned, and how rules for the conduct of "business" are to be made, and one important rule for the conduct of business is, by section 19, laid down by Parliament itself. It is also remarkable that the Indian Legislature does not exercise absolute control over the rules for the conduct of its own business, nor any control over its own adjournments; the first is partly, and the second entirely, under the control of the Executive Government. The Act also confers a somewhat more restricted, but still, as far as it goes, general, legislative authority upon local Councils in Madras and Bombay. Then, dealing with the subject of a change in the legislative machinery, the Act empowers the Governor-General in Council, that is, the Executive Council, by proclamation to establish local Legislative Councils in other parts of India, each of which would possess, in regard to its own particular district, a general power to make laws similar to that possessed by the local Councils established by the Act. Thus we find provision in the Act for the establishment and constitution of, and the conduct of business by, three Legislative Councils. We also find power to create new local Councils given to the Executive;

and it is also provided how these local Councils are to be constituted, and how they are to conduct their business. As to any other changes in the legislative machinery, the Act is wholly silent.

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The next Act is the 33 Vic., c. 3, expressly passed to make better provision for ordinary laws in certain parts of India. It was found, no doubt, that the machinery of even a local Legislature was too cumbrous for certain outlying districts, and this Act accordingly enables the Executive Government, under certain special restrictions, to make regulations (the word "laws" is not used) in a particular manner without any resort to the Legislative Council. But this can only be done in those parts of India to which the Secretary of State in Council shall declare the provisions of the Act applicable. In short, the Act provides a very special and guarded method of doing that which it is now said that the Indian Legislature may do without limit or restriction.

We see, therefore, that these Acts of Parliament nowhere confer any express power upon the Indian Legislature to change the machinery of legislation in India, but they do confer that power subject to important restrictions upon the Executive Government. Now, Parliament, in conferring this power upon the Executive Government, necessarily proceeded upon one of two views. Either it considered that the Indian Legislature had power to change the machinery of legislation in India, or it considered that it had no such power. In other words, Parliament, when these Acts were passed, either considered that it was making the sole and only provisions which existed for changing the legislative machinery in India, or it considered that it was conferring powers which need only be resorted to when the Executive Government could not obtain the powers which it required from the Legislative Council. I have come to the conclusion upon reading these Acts of Parliament that Parliament considered itself to be making the only provisions which existed for changing the machinery of legislation otherwise than by an Act passed by itself. In the first place, whatever theoretical difficulty might be imagined as arising out of a conflict between the Executive and Legislative Councils, I do not think that any one ever seri-

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ously contemplated that any such difficulty could occur. The existence of the Legislative Council secures publicity and deliberation in regard to the legislative action of Government. But the actual power of Government still remains for all practical purposes with the Executive. I do not think, for example, that Parliament passed such an Act as the 33 Vic., c. 3, merely in view of such a contingency as a conflict between the Executive and the Legislative Councils. In the next place, though it is not impossible, I think it unlikely that powers to make fundamental changes in the constitution would have been placed by Parliament simultaneously in the hands of two co-ordinate and independent bodies. In case of these two bodies working harmoniously, such a double power would be useless. In case of their working inharmoniously, such a double power would, as it seems to me, be objectionable. The very fact, therefore, that Parliament bestowed this power on the Executive Government of India, seems to me to show that it did not already exist in the Legislature. But, after all, what is most important, I cannot reconcile the language of these Acts of Parliament with the existence of the power now claimed for the Legislative Council of India. We must consider what the nature of the claim really is. It is nothing less than this: That the constitution of India, as created by Parliament in these Statutes, is a merely provisional one; that all the directions as to the mode of exercising legislative authority are only to remain in force and effect so long as the Legislature may choose that they should do so; that the separation which these Statutes make between the exercise of legislative and executive functions may be nullified; and all the powers now held by the Legislature may be re-transferred to any executive officer it may select, whenever it pleases to do so. The Legislature may, indeed, still continue to exist, but it may abrogate all its functions by transferring them to some one else. I do not so read these Acts of Parliament. I think that Parliament intended the provisions which it made for the exercise of legislative power in India to be permanent until altered by itself, and that it did not intend to give the Indian Legislature power to repeal them. It may be that there is not much in India to which the term "constitution" can be properly applied. But

there is something. The laws must now be made publicly and with deliberation. I do not think this provision either worthless or unimportant, and its worth and importance is greatly increased by the fact that it is the only protection which exists in this country against hasty and arbitrary legislation. The Counsel for the Crown argue that this protection may be swept away by the Indian Legislature, and its powers of legislation placed in the hands of a single individual. I do not think so. I think this protection was provided by Parliament for the people of India, and that it is only under the express authority of Parliament itself that they can be deprived of it.

Moreover, if we consider at one view the Acts of Parliament which have been passed during the last forty years, we cannot help seeing that there has been a considerable conflict of principles in dealing with Indian legislation. At one time there was an attempt to place the legislative authority for the whole of India in a single Council. This authority has been in part decentralized by the establishment of local Councils and, from time to time, in respect of certain districts, the legislative authority, after having been once separated from the executive, has been, under the express authority of Parliament, again confounded with it, and all powers without distinction have been again placed in the hands of the Executive Government, where they originally resided. I believe that there is no doubt what the origin of this conflict and of these changes was. Whilst it was considered desirable to secure for the people of India that the functions of Legislation should be separated from the other functions of Government, and should be performed with publicity and deliberation, it was found impossible that this should be done by a single Council, or even, entirely so, by a general Council with the assistance of several local Councils. Parliament has, therefore, from time to time, relieved these bodies from the pressure of an extreme difficulty. We even know that, to avoid the slow and tedious method of regular legislation, the executive authorities did, in former times, assume the power to legislate otherwise than in the regular manner for certain districts of India. This was done to a large extent in the Non-Regulation Provinces. But, in the whole course of the controversy which has thus arisen, and

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the pressure thus felt, I have never seen the claim distinctly put forward, that the right to change the legislative machinery in India was included within the general power to make laws, and was one which Parliament has entrusted to the discretion of Indian Legislative Councils. As far as I am aware, this easy and simple solution of the difficulty, namely, that these bodies have the general power to transfer their legislative authority to others, has never before been asserted; and no direct attempt to change the machinery of legislation in India by any Indian Legislative Council has ever yet been made.

Upon the whole, therefore, it seems to me that the fair and reasonable conclusion is this: That Parliament has provided for the exercise of the legislative authority in India by certain Councils at meetings duly constituted; further that, if any change in the legislative machinery is necessary, Parliament has provided how and by whom that change is to be made; that the power to make this change is vested by Parliament in the Executive Government alone, no such power being vested in any of the Legislative Councils. These arrangements for the exercise of legislative authority and for the changes in legislative machinery depend upon five Acts of Parliament, the 3 and 4 Will. IV., c. 85, the 16 and 17 Vic., c. 95, the 17 and 18 Vic., c. 77, the 24 and 25 Vic., c. 67, and the 33 Vic., c. 3. The Indian Legislature is expressly forbidden to make any law which shall repeal or in any way affect the provisions of any one of these five Acts. Four of these Acts are expressly named in the prohibitions—one in the first head of prohibition, and three in the second. The remaining one is included in the general prohibition contained in the sixth head. In the view that I take, the Indian Legislature cannot change the legislative machinery in India without affecting the provisions of these Acts of Parliament which created that machinery; and if it does in any way affect them, then, *ex consensu omnium*, its acts are void.

On both grounds, therefore, both because Act XXII. of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law, and because, if it is a law, it is one which the Legislative Council of India is expressly prohibited from making, I should hold that it is so far void.

I have dealt with this case upon the broad grounds upon which Mr. Kennedy put it. He boldly claimed for the Indian Legislative Council, of India the power to transfer its legislative functions to the Lieutenant-Governor of Bengal. Indeed, as I understood him, the only restriction he would admit was that the Legislative Council could not destroy its own power to legislate, though I see no reason why he should stop there. The Advocate-General did not, I think, go quite so far. But in my opinion there is no narrower question which can be substituted for the broad and general question which the learned Counsel put, and which I have considered. There are no words in the Acts of Parliament upon which legislative authority could be made transferable in one class of cases, and not in others. Of course, I do not for a moment suggest that every time discretion is entrusted to others, there is a transfer of legislative authority. Every Act of the Legislature abounds with examples of discretion entrusted to the Judicial and Executive Officers of Government, the legality of which no one would think of questioning. And there may be particular cases in which it would be a matter of considerable difficulty to say whether or no the discretion conferred was of the legislative kind. When the difficulty arises we must deal with it. But in the present case we have not to cope with this difficulty. By the express words of 24 and 25 Vic., c. 104, s. 9, it is only by legislation that the jurisdiction of this Court can be taken away. Whoever, therefore, takes away the jurisdiction of this Court must exercise legislative authority for the purpose. I have stated my reasons in an earlier part of this judgment for holding that it was wholly by the Lieutenant-Governor, and not in any sense or to any extent by the Indian Legislative Council, that the jurisdiction of the High Court was assumed to be taken away. The broad and general question seems to me, therefore, necessarily to arise—Can the Legislature confer upon the Lieutenant-Governor this legislative power?

I now come to a decision which, as it appears to me, strongly fortifies the conclusion I have come to as to the powers of the Indian Legislature. Indeed, it is a decision which I rely upon far more than on my own reasoning, and which we must overrule if

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we are to adopt the construction of the Councils Act contended for by the Crown.

In the year 1850 a suit was brought in the late Supreme Court against a servant of the Commissioners for the Improvement of the Town of Calcutta for the illegal seizure of a buggy. The defendant justified the seizure under Act XVI. of 1847 and certain rules which the Commissioners had made under that Act, alleging that the plaintiff had not paid the carriage-tax assessed upon him by the Commissioners. The plaintiff demurred to the plea, raising a question as to the legality of these rules. The first judgment was delivered by the Chief Justice, Sir LAWRENCE PEEL, as the judgment of himself and Sir JAMES COLVILLE. On that occasion the Court intimated a strong opinion that, if these rules varied the law, they were void, notwithstanding that they were made under the express authority of an Act of the Legislature. When, after an amendment of the pleadings, the same question again arose, Sir LAWRENCE PEEL gave the joint judgment of himself, Sir JAMES COLVILLE, and Sir ARTHUR BULLER. I have referred to the Registrar's book, and this shows (which the report in Taylor and Bell does not) how the Court was constituted on the two occasions on which the case was before it. The important passage is the first paragraph in the second judgment, and is to be found at page 479 of the Report in Taylor and Bell. The learned Judges, though they express great doubts whether the rules in that particular case were legal and binding, do not finally decide that point; but they do clearly and unmistakably lay down as a general principle of law applicable to India, that any substantial delegation of legislative authority by the Legislature of this country is void. The actual order made was a second permission to the defendant to amend his plea upon payment of costs. The second amendment was made; but I cannot find that the case went any further, and probably it was compromised. The Act itself was shortly afterwards repealed.

The case was very fully argued on two occasions; the defendant being represented by the Advocate-General and the Standing Counsel, and it is in all respects an authority which seems entitled to the very greatest weight.

I am also disposed to think that, if the American reports were available to us, we should find some authority there on this part of the case. There are several decisions of the American Courts referred to in a note to Kent's Comm., p. 504. One cannot be quite sure, without seeing the reports *in extenso*, how far these decisions go; but they seem to me to support the view that Act XXII. of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law.

It was asked in the course of the argument what was to be done in the case of emergency, and whether the Legislature might not do that which was necessary to meet an emergency? And assuming the answer to this question to be that the Legislature might do what was necessary, it was then argued that the Court could not enquire whether the emergency existed or not for of this the Legislature was the sole Judge. In fact, whilst asking us to dismiss all political considerations, the learned Counsel asks us to decide this case on the ground of political necessity. But we have nothing to do with any such question at all. Upon an emergency in which danger to life and property is involved, the law, as it stands, and without any alteration, gives increased and exceptional powers to the Executive. In extreme cases the Executive may suspend the operation of all laws; but I am not aware that such emergencies in any way affect the powers of the Legislature; certainly not unless the Legislature were actually overawed.

Lastly, it was said that, whether the Indian Legislative Council can or cannot lawfully delegate the power to make laws, it had done so for a long series of years, and a long list of Acts passed between 1845 and 1868 has been handed in to us, all of which, it is said, must be treated as instances of delegation of legislative authority if Act XXII. of 1869 be so treated. It was then argued that Parliament must have known what the Legislature of this country had been doing; and, had it not approved what was done, would have used language which would have placed the illegality of these proceedings beyond all possible doubt. I have some difficulty in dealing with an argument based upon an assumption of fact in a matter of this kind. I imagine that Parliament, when legislating for India, is dependent mainly upon such information

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as may be imparted to it by the Secretary of State, or by individual members who have a special acquaintance with this country. The position is, in fact, substantially the same, in this as in all other cases where the subject of legislation is not one of every-day experience. If the information thus obtained were not found to be sufficient, special inquiries would then be directed. Whether, in the particular case under consideration, Parliament did really arrive at a knowledge of the particular provisions in these Acts which are now relied on I am at a loss how to determine. I cannot, however, think that we need enter upon this inquiry. For, even if we presume knowledge, still, to infer ratification from silence would lead to consequences which seem to me inadmissible. Upon one particular point Parliament expressly refers to the practice here, and, no doubt, therefore was so far acquainted with it. In section 25 of the Councils Act it is recited that doubts have arisen as to the power to make laws for the Non-Regulation Provinces, otherwise than at regular meetings of the Legislative Council in conformity with the 3 and 4 Will. IV., c. 85. The section then goes on to give validity to laws that had not been so made. But it has never been contended that this recital and this ratification have legalized the previous practice. On the contrary, the accepted view has, I believe, always been that the previous practice was put an end to by this very Act. Speaking of this very practice in a Minute recorded in 1868, Sir Henry Maine says: "This system, of which the legality had long been doubted, was destroyed by the Indian Councils Act. No legislative authority now exists in India which is not derived from this Statute." But, if the argument of tacit recognition, which I am now considering, be correct, how is it possible to escape the conclusion that all the vague powers, half legislative, half executive, previously exercised in the Non-Regulation Provinces, are valid and subsisting powers? The argument seems here to stand on its strongest ground.

Nor do the Acts contained in the list which was handed in appear to me to afford (as was asserted) so many clear and undisputed instances of a transfer of legislative authority. I must guard myself against being drawn into a final expression of opinion as to the construction of Acts which are not properly

before us. I must also observe that the argument only extends to Acts passed prior to the Councils Act. It is not, and could not be, contended that the Indian Legislature can have increased its own powers by any recent usurpation. This gets rid of the two Acts most relied on, namely, Act XXIII. of 1861, section 39, and Act XXV. of 1861, section 445. Neither of these Acts had been passed when the Councils Act received the Royal assent, though probably they were passed before the Councils Act came into operation. I may also observe that these sections only confer powers on the Executive Government to extend the Acts to Non-Regulation Provinces. But we know that as to these districts certain exceptional notions were at that time held which are now exploded. As to those Acts which were passed prior to the Councils Act becoming law, Act VIII. of 1859, section 385, and Act XIV. of 1859, section 24, also relate only to Non-Regulation Provinces. Act VII. of 1845 only empowers the Local Government to make rules respecting the levying of water-rates and so forth, for canals which had been constructed at the expense of Government. Act XXXV. of 1850 and Act XXXVI. of 1857 give to the Local Government powers which are not legislative, but may be judicial. Act XVIII. of 1853 seems to me merely to give power to fix the limits of cantonments. Act XVII. of 1854 reserves to the Governor-General in Council powers which he would have had without this reservation. Act XXII. of 1855, Act XX. of 1856, Act XXIV. of 1859, and Act V. of 1861 are more difficult to construe. It would certainly have been safer to treat them as what are called General Clauses Acts, and for the Legislature in each case to have sanctioned their extension. But I may observe generally as to the provisions which these and many other Acts contain for the making of rules by the Executive Government in conformity with the Act, that we have the very high authority of the Judges who decided the case of *Biddle vs. Tarryn Churn Banerjee*, that the power to make such rules may be largely conferred without any delegation of legislative authority. Act XXIX. of 1857 does not seem to me to confer any legislative powers at all. Act XXIX. of 1858 was passed to meet a pressing emergency during the Mutiny, and ought not, I think, to be taken as a precedent. Act XIII. of 1859, section 5,

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and Act IX. of 1860, section 9, are, in my opinion, of very doubtful validity. I am not sure that they have ever been acted upon. It is by no means easy to ascertain this, for it is one of the peculiar results of this method of legislation that there is no information upon the subject contained in the Statute Book. But this I know that I have often heard the validity of these provisions questioned. Upon the whole, the list of Acts, prior to the passing of the Councils Act, does not seem to me to show any clear practice of transferring legislative authority which Parliament can be said to have known and recognized.

Before leaving this list I must observe that it contains a number of Acts which were evidently inserted under an entire misconception as to the nature of the difficulty which the Crown has to meet in establishing a claim now put forward on behalf of the Indian Legislature. It has never been doubted that the Legislature may confer discretion of the most extensive kind upon the Executive Officers of Government. I have already adverted to this, and, but for the misconception which this list discloses, I should not have thought it necessary to advert to it again. But it cannot be too clearly understood that no one denies that the Indian Legislature may entrust to the Executive Officers of Government power, for example, to regulate public processions, and to keep order in places of public resort. And the insertion of this provision (Act XIII. of 1856, section 77) in the list handed up only shows how entirely the question before us may be misunderstood. No one would think of challenging such a provision as this, as being beyond the powers of the Indian Legislature. If my view of the law threw any doubt upon the power of the Indian Legislature to pass such an Act as this, I should abandon it at once. But surely it is not necessary to insist at length upon the difference between the delegation of a power to keep order in the public streets and the delegation of a power to abolish all the existing Courts of justice in a large district, and to substitute such new ones as the *delegatus* may deem advisable. All that can be said is, that there may be a difficulty in some cases in saying whether the Act amounts to a transfer of legislative power. There would be precisely the same difficulty in drawing an exact line between the functions of the

Legislative and the functions of the Executive Council—between the powers which Judges possess to make rules of procedure and the power which they do not possess to make rules of substantive law. But this does not prove that these distinctions do not exist, or that they are not to be observed. We are, as I have already pointed out, not now called upon to deal with difficulties of this kind. If we are ever called upon to do so, I do not doubt that the utmost endeavour will be made to avoid impeding the useful action of the Legislature. I say with confidence that this Court (the only one of which I have a right to speak) has always shown the greatest care and circumspection in questioning the validity of Acts passed by the Indian Legislature. On the present occasion it has been pressed very strongly that the views of the law which I take, would lead to the most disastrous consequences. Nothing has been adduced in support of this statement, which appears to me quite unfounded. I would gladly have refrained from expressing any opinion upon these Acts at all, but not being able to do so, I am compelled to admit that there are some provisions in some of the Acts passed by the Legislative Council, the legality of which, upon the view of the law to which I adhere, may be doubtful. But I say distinctly that there is no ground whatever for the sweeping assertion which has been made that, on this view of the law, a very large proportion of these Acts must be at once pronounced to be illegal. No such consequences followed from the decision of *Biddle vs. Tarriny Churn Baperjee*, and my decision goes no further. The only proposition of law which I lay down is, that the Legislative Council of India cannot confer any power to legislate upon the Lieutenant-Governor of Bengal.

In my opinion, our jurisdiction in the Cossyah and Jynteeah Hills is now the same as it was before the notification was issued by the Lieutenant-Governor, and we ought therefore to send for the record of this case in order to see whether the appeal should be admitted.

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I concur in the judgment of Mr. Justice MARKBY.

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[CRIMINAL, REVISIONAL JURISDICTION.]

IN THE MATTER OF UMBICA PROSHAD . . . PETITIONER.

1897
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Section 505, Code of Criminal Procedure—Object of Chapter XXXVIII.

The object of Chapter XXXVIII., Code of Criminal Procedure, is the prevention, not the punishment, of crime. When a charge of a specific offence is under trial, proceedings under Chapter XXXVIII. should not be instituted.

Juggut Chunder Chuckerbutty (I. L. R., 2 Cal., 110) followed.

THIS was an application to the High Court, as a Court of Revision, to set aside the orders passed by the Magistrate of Shahabad on appeal, confirming the order of a Deputy Magistrate, which required security for good behaviour from the petitioner under section 505, Code of Criminal Procedure.

Mr. *H. E. Mendies* and Baboo *Moresh Chunder Chowdhry* for Petitioner.

The facts of this case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

MACPHERSON, J.:—

The state of things disclosed by the records which are before us is, to say the least of it, very remarkable. The Deputy Magistrate of Arrah has, under section 505 of the Criminal Procedure Code, directed the petitioner, Umbica Proshad Singh, to furnish "security of Rs. 20,000, in four sureties of Rs. 5,000 each, to be of good behaviour for the period of one year; in default, to be imprisoned for the same period, the first two months simply, and the remaining ten months rigorously." From this order the petitioner appealed to the Magistrate, but without success. We are now asked, in the exercise of this Court's powers of revision, &c., to set aside this order.

(1) *Macpherson and Bhatnagar*, 77.

The Deputy Magistrate in his judgment states that it is proved that the petitioner is the son of Santibilas Singh, a rich zemindar in the District of Shahabad, residing in Mouzah Chowgain; that both father and son are known to be among the Chowgain Baboos, a family well known in this district."

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One Bisheshur was arrested on a charge of robbery in the beginning of 1876; and on the 16th January 1876 made certain statements to the Magistrate admitting his having been concerned in a dacoity in the Mozufferpore and Hajipore road in March 1872, and also in several other dacoities. Six months afterwards this Bisheshur, having been in jail all the time, on the 10th of July made a further statement before the Magistrate, and in that he, for the first time, mentioned the name of the petitioner (Umbica Proshad Singh), alleging that on a certain occasion, some three or four years previously, he had received stolen goods.

Upon this statement being made, the petitioner was arrested and charged before the Deputy Magistrate with having received stolen goods. At first he was kept in prison, bail being refused. But, on an application being made to the High Court, it was ordered that he should be released on giving suitable bail. This order was made on the 10th of August. It reached the District Magistrate on the 12th, and was communicated to the Deputy Magistrate by an order of that date. The petitioner was then released on bail. But, before the petitioner could reach his house, the police, on the 15th of August, made a report that he was of bad repute, &c., and the proceedings out of which the present application arises thereupon commenced. These proceedings remained pending till the Deputy Magistrate, on the 18th of November, made the order complained of, and witnesses (sixteen for the prosecution and thirty-five for the defence) were examined on three or four days in August, six days in September, and two days in October.

About the same time that the order under section 505 was made (apparently on the 13th), the Deputy Magistrate committed Umbica Proshad Singh to take his trial at the Sessions on the original charge of receiving. On the trial on the 27th November the petitioner was acquitted. The Sessions Judge says in his

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judgment that there was no evidence whatever against the accused (Umbica Proshad) save the uncorroborated statement of the approver, Bisheshur; and he adds that he does not believe that Bisheshur's statement is true, and gives his reasons for that opinion.

We are particular in referring to the judgment of the Sessions Judge, because the Magistrate, in dismissing the appeal against the order under section 505, speaks of the petitioner having been discharged as the Sessions Judge was not satisfied with the evidence of Bisheshur, because uncorroborated. This scarcely represents accurately what the Judge said, for he not only distrusted Bisheshur's deposition, because uncorroborated, but said that he thought the deposition quite unreliable in itself, and that he did not believe it.

But the petitioner, who has been tried and acquitted so far as concerns the only specific charge which has been made against him, still remains liable to the order that he shall find four sureties in Rs. 5,000 each, or be imprisoned for a year, during ten months of which the imprisonment is to be rigorous. This matter not being before us by way of appeal, we do not discuss the details of the evidence. It is impossible to say there is no evidence to support a charge under section 505, though what there is, is of the loosest and worst description. And the Deputy Magistrate, believing it, and discrediting the thirty-five witnesses to character called by the accused, has found as a fact that the accused is of evil repute as regards almost every one of the matters specified in section 505.

The Deputy Magistrate says that both father and son are known by repute to be notorious *thangidars*, or receivers of stolen property, and to entertain notorious budmashes of the worst type; that both father and son are in the habit of sending out the budmashes to distant parts of the country to commit theft, &c., and on their return to receive the stolen property brought by them. And this disgraceful state of things (he says) is found to have existed for a very long time. Further, he finds that, "besides evidence of a general nature to prove that Umbica Proshad has a repute which extends rather widely of being *thangidar*, there is evidence of a specific nature which proves the disreputable notoriety the family have gained in the district;" and again he states it is proved "that

at one time the father of Umbica Proshad invited dacoits to be avenged on a man whom he bore a grudge." Finally he says, "he makes the order under section 505 on a consideration of the above, and the records of the several cases of bad livelihood filed in evidence in which the names of Chowgain Baboos figure in connection with the bad characters who have been convicted therein.

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One thing is very clear, on the face of the Deputy Magistrate's judgment, that, if the conduct of the petitioner has been for many years past such as he finds it was, it says but little for the police of the district that Umbica Proshad has been at large so long. And it is to be hoped that, before accepting as true all that was said by the policemen who were examined, the Deputy Magistrate duly considered the improbability of their having kept quiet all these years had they really known all that they now say they knew.

But it seems to us that the order of the Deputy Magistrate is bad, and must be quashed, the whole proceeding being a most arbitrary and entirely wrong use of the powers entrusted to Magistrates by Chapter XXXVIII. of the Criminal Procedure Code. The object of that Chapter is the prevention, not the punishment, of crime, and with that object it authorizes Magistrates to take from certain persons good and sufficient security for their good behaviour. But it is solely for the purpose of securing future good behaviour that section 505 can be used; and any attempt to use it for the purpose of punishing for past offences is wrong, and not sanctioned by the law.

Now, what were the circumstances under which this proceeding was instituted and this order made? Throughout the whole time from instituting the charge under section 505 on the 15th of August up to the making of the order on the 18th of November, the petitioner was under prosecution on a charge of receiving stolen property with a guilty knowledge. On the latter charge he had been under arrest for some weeks; and, bail having been refused by the Magistrate, he was released only by the order of this Court directing his release on giving sufficient bail. The moment that the order for this release on bail was received, the proceedings under section 505 were commenced. Now, when the accused was being actively prosecuted on a substantive charge, and he had given bail which the Magistrate deemed sufficient for his appearance when required, what possible necessity or

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justification was there for proceeding, simultaneously under section 505? Such a thing never was, contemplated by Chapter XXXVIII, and in no way falls within the spirit of that Chapter. Had the Magistrate, when the case at the Sessions broke down and the accused was acquitted, deemed it necessary to institute proceedings then under section 505, the case might possibly have been different. But, on proceedings so instituted, the petitioner's position would have been far better than it was prior to his acquittal and when the trial on the specific charge of receiving was hanging over his head.

Again, the order made is an order not made in any reasonable exercise of the large discretion vested in Magistrates by Chapter XXXVIII. The Deputy Magistrate says the petitioner is one of "the Chowgain Baboos", and is the son of a wealthy zemindar; and, because he is a man of position and means, he directs him to find security in the exceptionally large sum of Rs. 20,000, i. e., four sureties, each in Rs. 5,000, sentencing him in default to one year's imprisonment, of which ten months are to be rigorous. It is true that, by section 510, the imprisonment may be rigorous or not as the Magistrate may in each case direct. But, where, in the case of a man who has never been convicted of any offence, the Magistrate orders that security shall be given of a description which it must necessarily be difficult to find, and directs that, in default of giving the security, the imprisonment shall be rigorous, it appears to us that such an exercise of his discretion is wholly unreasonable and bad, especially when the Magistrate indicates no reason why, with a view to the prisoner's future good behaviour, it is desirable that the imprisonment shall be of the more severe kind.

Altogether it is quite clear that these proceedings under section 505 are entirely mistaken and bad. They either were illegally and wrongly instituted for the sole purpose of securing, at all hazards, the punishment of the petitioner, or there was an utter and fatal want of discretion in their institution, and in the order made. We think the case falls within the rule acted upon by the Court in the case of *Juggut Chunder Chuckerbutty* (I. L. R. 2 Cal., 110), and that the order of the Deputy Magistrate must be quashed. If the petitioner is in custody, he must be released at once.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF RAJA LEELANUND }
SINGH, BAHADOOR } PETITIONER.

1877
Nov. 29.

*Section 531, Code of Criminal Procedure—Doubtful possession—Section 530—
Interpretation of decree of Civil Court.*

The doubt upon which a Magistrate can act under section 531, Code of Criminal Procedure, must arise from his inability to decide on evidence offered by the contending parties as to their possession, and not on a doubt entertained without such inquiry.

A Magistrate, acting under section 530, cannot interpret the meaning of a decree of a Civil Court. He can determine only the fact of actual possession.

THIS was an application to set aside two orders of the Magistrate of Monghyr, passed under sections 530 and 531 of the Code of Criminal Procedure. It appears that some dispute arose between Raja Leelanund Singh and the Manager under the Court of Wards of the Durbungah Estate, regarding possession of certain lands, and whether they formed the subject of a decree given by Her Majesty's Privy Council in a suit between these parties. The Magistrate of Monghyr thereupon, on the application of the Manager, issued a notice on the Raja, calling upon him to show cause why he should not, under section 531 of the Code of Criminal Procedure, attach it until the matter was decided by a competent Civil Court, and finally, on July 4th, he did so attach the lands in dispute.

On the 26th July the Magistrate recorded that, "as there seemed to be some doubt as to which party was in possession, and there seemed to be no adequate means of determining it, this Court took possession, under section 531, Code of Criminal Procedure, to prevent a breach of the peace."

He then proceeded to consider the course of litigation in the Civil Courts between these parties, the result of which, in his opinion, showed that the Raja was not in possession, and he accordingly ordered the police to give possession to the Manager of the Court of Wards.

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Paul (Advocate-General) and Mr. *R. E. Twisdale* for the Petitioner.

RAJA

LEELANUND

SINGH,

BAHADOOR,

Petitioner.

Argument.

The order of the Magistrate under section 531 is *ultra vires*; and, if it be a legal order, the Magistrate was not competent to withdraw it, and to give possession to the Manager of the Court of Wards, until the matter was decided by a competent Civil Court. The Magistrate was not competent to review the litigation between the parties relating to the title of the parties, and to decide on what he considered to be the result; but he should have decided only the matter of actual possession, which the proceedings in execution of the decree of the Privy Council showed to be with the Raja.

Baboo *Annoda Proshad Banerjee* and Baboo *Jugdanand Mookerjee* for the Opposite Party.

The judgment of the High Court (1) was delivered by

JACKSON, J. JACKSON, J. :—

Both the orders of the Magistrate in this case must be set aside: the first, because it was passed without enquiry and not under circumstances which would justify such an order. As the order was originally made, it purported to proceed upon the fact that the suit was going on in the High Court. That is no ground for such an order. The Magistrate afterwards desires to explain it as being justified by a doubt as to where possession rested. But the Magistrate is not competent to recite a doubt in his mind regarding any specific property, and thereupon immediately to attach that property. The doubt must be the result of his inability to determine upon the evidence offered by both parties, and thereupon he may proceed to attach. As to the second order, it clearly proceeds upon the Magistrate's interpretation of a decision of a Civil Court. That is no ground for the determination of the Magistrate under the section. He is bound to enquire into possession, and that alone. Both of these orders, therefore, are made without authority, and must be set aside.

[EXTRAORDINARY CRIMINAL JURISDICTION.]

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June 23.

THE EMPRESS vs. MUKHUN KUMAR.

Section 263, Code of Criminal Procedure—Verdict of Jury—Dissentient opinion of Sessions Judge—High Court.

Per CURIAM.—A very large discretionary power is vested in the High Court by section 263 of the Code of Criminal Procedure. No fixed rules can be laid down, for the exercise of that discretion in every instance; and the decision in each case submitted must depend upon its own peculiar circumstances.

Per GARTH, C.J., and PRINSEP, J. (MARKBY, J., contra).—The rule laid down in *Queen vs. Wazir Mundul*, 25 W. R., 25, Criminal Rulings, goes too far.

PRINSEP, J. (MARKBY, J., contra).—The law does not prevent a Sessions Judge from asking a Jury regarding the grounds for their verdict, and such a course is desirable in the ends of justice. See *Queen vs. Sustiram Mundul*, 21 W. R., 1.

THIS was a case tried by Jury in the Sessions Court of Burdwan. The prisoner was charged with the murder of his brother, and was acquitted by the unanimous verdict of the Jury. The Sessions Judge disagreed with this verdict, and submitted the case, under section 263 of the Code of Criminal Procedure, for the orders of the High Court.

No one appeared for the prisoner.

The case was originally heard by MARKBY and PRINSEP, JJ.; and, as they differed in opinion, it was re-heard by the same Judges sitting with GARTH, C.J.

The facts of this case will sufficiently appear in the judgments (1) delivered:—

MARKBY, J.:—

MARKBY, J.

In this case the prisoner's brother was murdered in his own house in the night. The only person residing with him was the

(1) GARTH, C.J., MARKBY and PRINSEP, JJ.

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 Judgment.
 MARKBY, J.

prisoner. The prisoner himself, at an early hour, gave information of the murder to several persons, in the village, including the village-gomashta. The prisoner at first said that he did not know who had committed the murder, but, on coming before the gomashta, he charged Hera Lall (a neighbour) and Ramanath with having committed it. The same Hera Lall states that, on the night of the murder, the prisoner came to his house, and, standing outside, called out that he had killed his brother, and asked Hera Lall to assist him in concealing the body. This is corroborated by Hera Lall's two sisters, who were in another house four or five cubits distant, and who say they heard what the prisoner said.

Upon the evidence as recorded, there is, as it appears to me, a direct contradiction between Hera Lall and the gomashta as to whether Hera Lall reported this conversation to the gomashta immediately. But the Jury seem to have thought that the gomashta said that Hera Lall told him of this conversation afterwards. There is also, in my opinion, considerable improbability that a man who had committed a murder should communicate it to a neighbour in the manner described by Hera Lall. It was not unlikely that the prisoner, if he committed the murder, would ask Hera Lall to assist him in disposing of the body; but he would, in all probability, I think, have gone inside the house to make this request, and would have taken care not to be overheard. The Jury, therefore, had, as far as I can see, reasonable grounds for disbelieving the story told by Hera Lall.

The other evidence in the case consists of the confession of the prisoner and the evidence of the lad Denonath, who says that, on the day preceding the murder, the prisoner borrowed from him an axe belonging to his uncle. There is no doubt that with this weapon the murder was committed. No one could have complained if, upon the confession thus corroborated, the Jury had convicted the prisoner, but they did not do so. They unanimously acquitted him.

The question for me is, whether I am to say the prisoner is guilty in the face of this unanimous verdict of the Jury. I have not heard the witnesses, and cannot judge of their demeanour. The case, as I look at it, is essentially one for the considera-

tion of a Jury. 'It depends mainly upon whether the prisoner's confession ought to be accepted as true. There can be little doubt that, if the Jury rejected the confession of the prisoner, they did so because they suspected it might have been made under the influence of the police. With great deference to the opinion of the Chief Justice, I think the Jury had a right to consider whether it was probable that this confession was due to the influence of the police, though there was no direct evidence of it. I think there would be great danger if this view of the matter were not considered in every case. It is certainly not too much to say that the police possess great influence over the prisoners in their charge, and that they do sometimes obtain the most circumstantial confessions which are false. A remarkable case of the kind will be found in 7 W. R., Cr., 3, and I have now before me the recorded opinion of a Sessions Judge of great experience, that witnesses are threatened by the police in nearly every case which is investigated. If witnesses are threatened, there can be little doubt that accused persons in custody are threatened also. I think, therefore, that the Jury have a right to accept every confession coming from persons who have been in the custody of the police with caution, and with a regard to the probability of its having been made under the influence of the police; and a Jury is, in my opinion, better qualified than I am to judge how far this caution is to be carried, and to determine whether a confession is to be accepted in any particular case. I do not, therefore, feel justified in saying that the Jury could not reasonably have arrived upon this evidence at a verdict of acquittal.

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MARKBY, J.

With regard to the duty of Judges of this Court in dealing with the verdict of a Jury referred under section 263, I agree that the words of that section leave the discretion of the Judges uncontrolled, and that we cannot lay down any fixed rules for the exercise of that discretion according to one's own conscience. At the same time I agree generally with, and adhere to, the observations made by PHEAR and MORRIS, JJ., in 21 W. R., Cr., 4; by MACPHERSON and MORRIS, JJ., in 20 W. R., Cr., 73; by BIRCH, J., and myself in 20 W. R., Cr., 33; by MACPHERSON and MORRIS, JJ., in 25 W. R., Cr., 25; and by the

1877 High Court of Bombay. No doubt, these observations cannot
 THE EMPRESS amount to more than an expression as to how the particular Judges
 MUKHUN who made them thought their discretion ought to be exercised.
 KUMAR. But dealing, as I am now, with a case of a unanimous verdict of
 Judgment, acquittal, I adopt those observations as my guide; and what they
 MARKBY, J. amount to is well expressed by the Bombay High Court, that we
 ought not, as a general rule, to interfere, under section 263, with
 the verdict of a Jury, unless it is perverse and patently wrong.
 Of course, I am here supposing that the verdict of the Jury has
 been arrived at legally and properly. In the present case, there
 is no suggestion of any, impropriety or illegality in the verdict
 of the Jury. It seems to be impossible to admit the supposition
 that the Jury are not fit to perform their duty. They have
 declared unanimously that, in their opinion, the prisoner is not
 guilty; and I do not feel justified in saying that that verdict should
 not be recorded.

As regards the power of this Court to order a new trial in a
 case referred under section 263, I do not wish to say anything,
 as I understand that course would not be taken in this case, even
 if the power exists. Nor, as at present advised, am, I prepared to
 recommend that Juries should be questioned by the Judges as
 to the grounds upon which they base their conclusions.

GARTH, C.J. GARTH, C.J.:—

After a careful consideration of this case, I have come to the
 conclusion that, notwithstanding the verdict of the Jury, we
 ought to convict the prisoner of murder. If he be guilty at all,
 there can be no doubt as to the quality of the offence. The de-
 ceased was barbarously murdered by some one; and the question,
 if question there be, is, whether the prisoner is the guilty
 man.

Now, the evidence in the case consists in great measure of a
 confession made by the prisoner himself before the Magistrate of
 Burdwan on the 1st March last.

From that statement, and from the admitted facts of the case, it
 appears that the prisoner was the younger brother, and that the two
 brothers lived together in one small house. Very near them lived a
 man named Hera Lal and his two sisters, named Sarasvatee and

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Bidhoo, with whom the prisoner and his brother seem to have carried on an illicit intercourse. The deceased, the elder brother, had consorted with Sarasvatee, the elder sister, for several months, when he left her for the youngest sister. Bidhoo, still visiting the elder one occasionally. The prisoner, then a young man of seventeen or eighteen years of age, used to consort with the elder sister; and this community of intercourse appears to have led to quarrels between the brothers.

On Saturday, the 24th of February last, both brothers were in the early part of the day at the market; and a dispute arose between them, with reference to some pice which the deceased had given to the prisoner; and which the latter seems not to have accounted for. According to the prisoner's statement, he was severely scolded by his brother for concealing these pice, and on the following morning (Sunday) he, the prisoner, borrowed an axe from a neighbour, Jadoobun Tantec, and placed it beside the door of their house. On the evening of that day he had a conversation with Sarasvatee, who, he says, advised him to kill his brother, suggesting that, if the brother were dead, she and the prisoner might live together comfortably. The prisoner then states that he and his brother went to sleep as usual in the same house; and that, after his brother had risen at midnight to see an eclipse of the moon, and had laid down to sleep again, he, the prisoner, took the axe and struck him with it three or four times on the head. His brother died, without a word. He then went to the house where Hera Lall and his sisters lived, told them what he had done, and begged Hera Lall to help him to bury the body. Sarasvatee went with him to look at it, and Hera Lall advised him to go to the gomashtha of the village, and say what he had done. He appears first to have gone to one or two other persons, and told them that his brother was murdered, without mentioning who had committed the murder; and he then went to the thanna with the peon early in the morning of the 26th of February, when he told the gomashtha that Hera Lall and Ramanath (a friend of Hera Lall's) had murdered his brother.

These circumstances are for the most part detailed in the prisoner's statement, before the Magistrate, in what appeared to me the most natural and circumstantial manner, with these remark-

[CRIMINAL.]

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able words, "But God knows that I am the murderer, and only I." The Magistrate observes upon this:—

"N.B.—The accused, a slight miserable looking youth, raises both his hands up in an earnest manner in saying this, a statement which he seems to make with all sincerity."

This confession of the prisoner is corroborated most fully and satisfactorily, as it seems to me, by the evidence adduced for the prosecution. Hera Lall states that the prisoner came to his house soon after midnight on the night in question, and told him, from outside the door, that he had killed his brother, and begged him to come and help to bury him. The sisters, Sarasvatee and Bidhoo, confirm Hira Lall's statement, and also speak to the circumstances which led to the quarrel between the two brothers; and, lastly, Jadoobun is called, the neighbour from whom the axe was borrowed, and he confirms the prisoner's statement in that respect. There is not the least doubt that this axe was the instrument with which the murder was committed. The deceased's head was cut in such a manner as could only have been the result of cuts by some such instrument; and the axe, covered with blood, was lying by the side of the deceased. The surgeon's evidence is, to my thinking, conclusive upon this point.

Then, here we have a complete circumstantial and apparently genuine confession of the offence by the prisoner. The Magistrate before whom it was taken is convinced of its truth and sincerity. That confession is confirmed by what seems to me perfectly reliable evidence. The Sessions Judge has recorded his opinion that the verdict of the Jury is wrong; and I confess it appears to me almost impossible to account for the verdict of the Jury upon anything like reasonable grounds.

It is true that the prisoner, on the morning of Monday, the 26th, laid the blame upon Hera Lall and Ramanath, and that he afterwards repeated that charge before the Sessions Judge; but he said on that occasion that he never made the statement at all before the Joint Magistrate, which was taken down from his own lips, and also that what he did say was suggested to him by the police.

I confess I cannot see the slightest ground for believing this statement of the prisoner; and it is quite uncorroborated by any

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evidence in the case. We have nothing before us, nor had the Jury any evidence before them, to induce the belief that the Magistrate made any mistake, or that the prisoner's confession was extorted from him by improper conduct on the part of the police; and, in the absence of such evidence, I cannot think that we have any right to assume that either the Magistrate or the police were guilty of any breach of duty. In this respect, I quite agree with what is said by Mr. Justice MACPHERSON in the 25 W. R., Criminal Rulings, 26. It is difficult, no doubt, to account for the conclusion at which the Jury arrived. They do not appear to have thought anything of the supposed contradiction between the evidence of Hera Lall and of the gomashṭa, to which my learned brother, Mr. Justice MARKBY, appears to attach some weight; nor, as far as I can discover, is there any reasonable ground for their disbelieving the prisoner's confession or the other evidence in the case. It is very possible, as has been suggested by my learned brother, Mr. Justice PRINSEP, that they may have been influenced by what seems a too prevalent notion, namely, that no conviction for murder is justifiable without the evidence of some eye-witness of the crime; and the summing up of the learned Judge, at the trial, seems to point to some such difficulty. But whatever the causes operating upon the mind of the Jury may have been, I myself cannot see any reasonable grounds for their arriving at the verdict of acquittal.

In the consideration of this case two questions have suggested themselves to my learned brothers and myself, which appeared to be of very general importance: First, how far this Court is justified, in a case referred under section 263 of the Criminal Procedure Code, in convicting a prisoner contrary to the express and unexplained finding of a Jury; and, secondly, whether this Court has power under that section to order a new trial.

With regard to the first of these questions, it appears to me that, by that section, the Legislature intended to vest in the High Courts a very large discretion; and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled. The verdict of a Jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined, ought

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THE EMPRESS always, in my opinion, to command its proper weight, and the more unanimous their verdict may be, and the less likely to have been induced or influenced by prejudice or error, the more entitled it should be to our respect and consideration. But there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as, for instance, where, out of a Jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority, or where it is manifest, from the conduct of the Jury or otherwise, that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment.

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In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with Mr. Justice MACPHERSON and Mr. Justice MORRIS (in 25 W. R., Criminal Rulings, 77) that "the verdict of a Jury should not be interfered with, except where there is a gross and unmistakable miscarriage of justice;" nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence, without giving to the verdict of the Jury its proper weight. Each case, in my view of the section, should depend on its own circumstances.

As regards the power of the Court to grant a new trial, I am inclined to think, as at present advised, that they have no such power. The language of the section appears to mean that, where the verdict of the Jury is not in accordance with the opinion of the Judge, it should be referred to the High Court, upon consideration of the whole case, law and fact, and with due regard to the finding of the Jury, to determine the question finally. It is remarkable, as observed by my brother, Mr. Justice PRINSEP, that the present Code of Criminal Procedure, as passed in 1872, contains no provision for the retrial of an appeal, and that it is only by the addition to section 280 (introduced by section 28, Act XI. of 1874), that the power now exists in an Appellate Court, "to order the appellant to be retried;" and that, though some parts of section 263 were amended at the same time, no special provision was made for extending the power to order a retrial to cases submitted to the High Court under section 263. In other parts of the Act, if such a power is intended to be exercised, it is given in

express terms. (See sections 272, 284, 297, 299, and 448 of the Criminal Procedure Code.) Moreover, it will be found that in this section the High Courts are empowered to decide the case finally, without reference to the particular charge upon which the prisoner was formally tried in the Court below; and it seems clear that this provision would not be applicable to a case sent back for retrial.

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In this particular case, I confess I should not be disposed to send back the case for retrial, even if we had the power to do so.

There appear to me very cogent reasons against such a course.

PRINSEP, J.

PRINSEP, J.

In this case, in which there can be no doubt that a man has been murdered in a most deliberate and brutal manner, the accused has been acquitted by an unanimous verdict of the Jury; but the Sessions Judge who presided at that trial has disagreed with that verdict, and has submitted the case to the High Court under section 263 of the Code of Criminal Procedure.

The Sessions Judge, in recording the grounds of his opinion for submitting the case (section 464), has stated: "I do not think it necessary to add anything to the evidence as it stands on the record, and to my summing up, except to say that to my mind there appears to be no reasonable doubt that the prisoner committed the murder."

We have no means of learning the grounds on which the Jury came to an unanimous verdict of acquittal. We must, therefore, assume that the Jury either wholly disbelieved the evidence on the record, or that they considered it as insufficient to establish beyond all reasonable doubt the prisoner's guilt.

I can find no good reason for either of these opinions.

The prisoner confessed in a full and circumstantial manner to the committing Magistrate, his personal demeanour as then recorded was remarkable; and, when the confessional statement was read over to him, he appears to have interposed an additional statement on a point, thus showing that he was fully cognizant of the proceedings then being taken, that that statement of the course of events emanated from himself, and that it was a true statement of what had occurred.

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* **THE EMPRESS** So far as the facts stated on that confession could be confirmed, they have been confirmed by the evidence of the witnesses.

* **MUKHUN KUMAR.** There certainly is the apparent contradiction noticed by Mr. Justice MARKBY, but to me this is susceptible of explanation, and

* **Judgment.** it is shown from the record of what took place when the Sessions

* **PRINSEP, J.** Judge proposed to clear this contradiction by calling other witnesses, that the Jury not only attached no importance to it, but considered that the statements made by Hera Lall and the gomash-ta were not really contradictory.

I see nothing absolutely improbable in the prisoner's going to Hera Lall after committing the 'murder. He went to ask for Hera Lall's assistance to hide the body under the ashes in the furnace-house of his pottery; and, if we believe his own statement that he was induced by one of Hera Lall's sisters to commit the murder, the fact, of his going there receives a further explanation.

That he subsequently denounced Hera Lall as the murderer is accounted for by the Sessions Judge as the result of deliberation after an interval to collect his thoughts, but his acts between going to Hera Lall and the gomash-ta seem to be more consistent with his own guilt rather than with the truth of his suspicion of Hera Lall. His first object seems to have been to get out of trouble himself, and then, when he had recovered from the shock of his crime, to accuse another, the nearest neighbour, and one who had declined to help him out of the difficulty. There is, moreover, no apparent motive on the part of Hera Lall to commit this offence, for his sisters had, for some time, been living with the two brothers without any remonstrance on his part. It is suggested that the Jury disbelieved the prisoner's confession made to the Magistrate, but denied on the Sessions trial. If they did so, in my opinion they acted most capriciously, and not in the proper exercise of their duty. I have already stated, on what grounds the confession bears the impress of truth. That it was voluntarily made has been certified by the Magistrate, and this is also borne out by the prisoner's own demeanour to which I have adverted. But in the Sessions Court the prisoner said, "I did not say to the Magistrate a word of what I have now heard read. They (the police) tied and beat me, and tutored me what to say."

The reported cases of this country may occasionally show

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instances of false or extorted confessions, and to us, who are strangers, it may seem highly improbable that any confession should be voluntarily made so soon after the commission of a crime; but in my opinion we are not, therefore, justified in discarding every confession that may be made on hypothetical grounds of improbability, or of its having been improperly obtained, when, opposed to such grounds, we have tangible evidence of its truth and of its having been voluntarily made. No doubt, the frequency of confessions in this country has made the people, and those who are concerned in the administration of justice as Judges or Jurors, disinclined to attach that weight to them which they would otherwise be entitled to receive; but when there is on the face of a confession, as there is in the present case, evidence of its being a truthful and voluntary confession, and when it is corroborated by all the evidence which the nature of the case admits, I think that the verdict of a Jury in disregarding such confession is a wrong verdict, and that, in the ends of justice, that verdict should not receive its ordinary legal effect.

I am inclined, however, from a long experience of trials by Jury, to attribute this verdict to an idea too prevalent among Jurors in this country, that in cases of homicide the direct evidence of an eye-witness is necessary for conviction; but that is only speculative. In either view of the reasons on which we must assume the verdict was founded, it is, in my opinion, contrary to the evidence which the Sessions Judge has believed, and which I can find no sufficient reason to reject as unreliable.

I am satisfied to accept the rule laid down in the case that each case coming before this Court under section 263 should depend on its own circumstances as to the weight to be given to the verdict of a Jury from which the Sessions Judge has disagreed. I admit that it is impossible to lay down any inflexible rule on the subject; but I have the strongest objection to assigning any particular grounds for any verdict, the correctness of which is impugned by a Sessions Judge. It would be far more satisfactory if the rule contained in the second clause of section 263 were applied to such cases, so as to enable a Sessions Judge to ascertain the grounds of a verdict before deciding to submit a case to the High Court. He would be better able to decide

1877 whether the case should be submitted, and the High Court would
THE EMPRESS be in a position to determine whether the verdict was a reasonable
 or an unreasonable and perverse verdict. I am aware that this
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KUMAR. proposition is opposed to the opinion expressed in the case report-
Judgment. ed in 21 W. R., 1; but in my opinion the terms of the law do not
PRINSEP, J. necessarily exclude this course of procedure, and to me, notwith-
 standing the objections stated by Mr. Justice PHEAR, it seems
 highly desirable in the proper administration of justice.

With the opinions of so many learned Judges against me, I submit my own opinion with much diffidence; but I conceive that, in a case coming before the High Court under section 263, it is the duty of the High Court to weigh the evidence irrespective of the verdict, and it is only when there is some reasonable doubt as to the credibility of that evidence that such a verdict should be accepted. If, however, we had some record of the grounds on which a doubtful verdict was based, we should have no difficulty in dealing with such cases. A comparison between the present and the former Code of Criminal Procedure will show that under the latter the verdict of a Jury was absolute, and that either unanimity or something more than a bare majority of the Jurors was necessary for a legal verdict, whereas the present Code expressly permits the High Court to consider the facts in a case referred for confirmation of a sentence, of death, and to take fresh evidence in it, quite irrespective of the verdict of a Jury; and, it has further given power under section 263 to decide a case on the facts, when the Sessions Judge disagrees from a verdict. It seems to me that, by allowing a verdict of a bare majority of the Jurors, by enabling a Sessions Judge to suspend giving effect to a verdict from which he disagrees, by empowering the High Court to convict or acquit irrespective of such a verdict, and by also empowering them to pass final order on a death case on the facts, as well as to take fresh evidence, it was the intention of the Legislature to make the full force that would ordinarily attach to the verdict of a Jury dependent on the concurrence, or rather absence of disagreement, on the part of the Sessions Judge; and that, in a case coming before the High Court under section 263, the impugned verdict should receive much less weight than a verdict of a Jury used to receive.

under the former Code of Procedure, or now receives in England under the practice of English lawyers.

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Whether we could order a retrial in a case coming before us under section 263, it is not, strictly speaking, necessary to determine; but, after careful consideration of the terms of the last clause of section 263, and an application to it of the several sections relating to appeal, I am of opinion that the opening words of that clause refer merely to the procedure regarding appeals, such as service of notices, whereas the powers of the High Court are defined by that clause itself, and are limited to an acquittal or conviction on the evidence on the record. No good result would, I conceive, arise from any retrial in such a case on evidence which had become stale, and before a second Jury who could not be otherwise than prejudiced in their verdict by the verdict already delivered on a previous trial.

I concur with the Chief Justice in convicting the prisoner of culpable homicide amounting to murder.

GARTH, C.J. :—

GARTH, C.J.

As the majority of the Court is in favour of a conviction, we accordingly find Mukhun Kumar guilty of culpable homicide amounting to murder, by causing the death of Judhisteer Kumar, an offence punishable under section 302 of the Indian Penal Code; and, as there are no extenuating circumstances, we sentence the said Mukhun Kumar to be hanged by the neck until he is dead.

NOTE.—The judgments of the High Court in this case are of considerable importance, because they have relaxed the rule by which the High Court has hitherto dealt with cases coming before it under section 263 of the Code of Criminal Procedure, and it may not be out of place here to state the nature, the course, and the effect of legislation in this direction and the current of the decisions of the High Court.

[CRIMINAL.]

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In all matters of appeal against a sentence passed by a Court of Session in a case tried by Jury, "the appeal shall be admissible on a matter of law only" (section 271 of the Code of Criminal Procedure as enacted by section 22, Act XI. of 1874), and this was the rule under the Code of 1861. Under that Code, however, as pointed out by Mr. Justice PRINSEP, "the verdict of a Jury was absolute, and either unanimity or something more than a bare majority of the Jurors was necessary for a legal verdict." The present Code permits the verdict of a bare majority to be a legal verdict, but has placed it in the power of the Sessions Judge to stay execution if he "disagrees" with the verdict of a Jury (unanimous or by a majority) by declaring that under such circumstances he "may submit the case to the High Court," which "shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law without reference to the particular charges as to which the Court of Session may have disagreed with the verdict." (Section 263 of the Code, and section 21, Act XI. of 1874.) In order, therefore, to have a complete verdict of a Jury, the Legislature has required the verdict to be unanimous or of a majority either concurred in, or not "disagreed" with, by the Sessions Judge, or that it should be approved of by the High Court on a full consideration of the law as well as of the facts.

The High Court, by a series of judgments which will be cited, has hitherto refused to question the correctness of the verdict of a Jury (of acquittal or of conviction, though with one exception all the cases were of acquittal) unless it could be shown that it was "clearly and patently wrong," notwithstanding that the Court had before it the opinion of the Sessions Judge who presided at the trial that he held that opinion.

In the case of *The Queen vs. Ram Churn Ghose*, 20 W. R., 33 MARKBY and BIRCH, JJ., stated: "We should not interfere with the verdict of a Jury unless it were established in the clearest possible manner that they had wholly miscarried in their conclusion upon the case. They are the constituted tribunal upon questions of fact in the districts where the Jury system has been introduced, and it will be wholly destructive of that institution if the greatest

possible confidence is not placed in them." So in the case of *The Queen vs. Sham Bagdee and others*, 20 W. R., 73, MACPHERSON, J. (MORRIS, J., concurring), said: "We ought not to interfere with a verdict unless we can say decidedly that we think that it was clearly wrong. If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of Assessors. I presume that, if this were the intention of the Legislature, it would have said so. But the Legislature has not said so. As it is, I consider that the Court should exercise the power vested in it by section 263 only in cases in which it finds the verdict of the Jury clearly and undoubtedly wrong. This is not such a case, although I may admit that there may be room for doubts being entertained as to the facts." Next, in the case of *The Queen vs. Huro Manjhee*, 21 W. R., 4, PHEAR and MORRIS, JJ., expressed entire concurrence with the opinion expressed in the case of *The Queen vs. Nobin Chunder Banerjee*, 20 W. R., 70 (MACPHERSON and MORRIS, JJ.), in which it was stated "The unanimous verdict of a Jury ought not to be set aside, even if the Sessions Judge disagree with it, unless that verdict is clearly and patently wrong and unsustainable on the evidence." The Court added: "If there were any substantial doubt in this case, we should certainly not disturb the verdict. It appears to us that there can be no reasonable doubt about this matter." So in the case of *The Queen vs. Wazir Mundul*, 25 W. R., 25, MACPHERSON and MORRIS, JJ., held: "Where there is a patent and unquestionable failure of justice, it is necessary for the High Court to set aside the verdict of a Jury; but, so long as trial by Jury exists, the verdict of a Jury must be accepted, and must stand, unless it is manifestly and certainly wrong."

Lastly, the Bombay High Court (WEST and NANABHAI HARIDAS, JJ.), in the case of *The Queen vs. Khanderav Bajirav*, I. L. R., 1 Bom., 10, made the following observations in a case coming before it under section 263 of the Code of Criminal Procedure: "It is a well-recognized principle that the Courts in England will not set aside the verdict of a Jury, unless it be perverse and patently wrong, or

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may have been induced by an error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers: first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature; and, secondly, because any undue interference may tend to diminish the sense of responsibility. BURKE, profoundly versed in the principle of the British Constitution, said of Juries: 'I will make no man, or set of men, a complement of the Constitution.' In this country, we must never let our acquiescence grow into a betrayal of justice. When Juries know that they are liable to the scrutiny and supervision of this Court, they will feel the necessity of exercising conscientious deliberation in arriving at their verdict. The same check will prevent temptation to a wilfully wrong verdict from being held out to them. It is our duty in the present case to satisfy ourselves that the verdict of acquittal is proper, or at least sustainable; and, if we find that it is not, the law enjoins on us to set it aside, and pass the right judgment ourselves."

The rule now laid down by the High Court is, that the mode of dealing with each case must depend upon its circumstances. In the case now reported, Mr. Justice MARKBY was in favour of affirming the verdict of the Jury acquitting the prisoner, because he considered that they disbelieved the evidence against him, and there were grounds for coming to that conclusion. The majority of the High Court, GARTH, C.J., and PRINSEP, J., thought that the verdict was a perverse verdict, as there was no valid reason for disbelieving that evidence.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CAPTAIN MICHELL . . PETITIONER.

1878
Jan. 24.

Bank-note—Stolen property—Goods—Contract Act—Right of appeal by complainant, the robbed person—Code of Criminal Procedure, sections 286, 418, 419.

A Government currency note stolen from A was cashed with B. The thief was tried and convicted for the theft, and after this conviction the Magistrate ordered the note to be returned to B: *Held* that the Sessions Judge was, under section 419, of the Code of Criminal Procedure, the proper person to deal with an application made by A for the reversal of that order.

Where a stolen currency note has been delivered to a *bona-fide* holder for value, the Court will not, on conviction of the thief, restore the note to the person from whom it was stolen.

A Government currency note is not "goods" within the meaning of the Contract Act.

THIS was a case referred to the High Court, as a Court of Revision, by the Sessions Judge of the 24-Pergunnahs. The facts of the case are set forth in his memorandum, which is as follows:—

"This is an application questioning the propriety of an order passed by the Joint Magistrate under section 418 of the Code of Criminal Procedure, by which a currency note of Rs. 100, found to have been stolen from Captain Michell, has, on conviction of the thief, been given to Subal Chunder Podder (with whom it was cashed by the thief), rather than to its original owner."

Statement.

"When this application was first made to me, I thought that, having regard to the terms of section 419, the petitioner had the right of appeal; but, on re-consideration, I am of opinion that no appeal lies merely from such an order. There is no express

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MATTER OF
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MICHELL,
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—
Statement.

provision of the law allowing an appeal against a mere order under section 418, and therefore it would seem that, under section 286, no appeal can be entertained. The terms of section 419 would seem to refer to a case in which an appeal has been lawfully made against an order of conviction or acquittal, and an order under section 418 being a part or consequence of such order, it thus comes under consideration by the "Court of Appeal, Reference, or Revision," which is empowered to order that order to be stayed, and may modify, alter, or annul it. In this view of the law, as the application made to me concerns only the matter dealt with under section 418, I am of opinion that I am not competent to interfere as a Court of Appeal; but as I am also of opinion that the order of the Joint Magistrate is contrary to law, I submit the case for the orders of the Honourable High Court.

"As far as the evidence goes there is no reason to doubt the honesty of the Poddar with whom the currency note was cashed by the thief. The question is, whether the Poddar should be allowed to retain it as against its original owner from whom it was stolen. It seems to me that this is a matter which can properly be dealt with by a Magistrate, but that the order passed by the Joint Magistrate, though it is in accordance with the principles of the law of England, is not in accordance with section 108 of the Contract Act. Currency notes would seem to be "goods" within the definition given in section 76 of that Act, and therefore this case is similar to that given in illustration (a) to section 108.

"I think it right, however, to state that the case of *The Collector of Salem* (reported in 7 Madra's 233) would seem to lay down a different view of our law, but in that case the position of Government was alone under consideration, and the judgment seems to have proceeded on the ground that, under the law, the Government Treasury Officer was bound to cash a currency note; and that, therefore, the Government was protected against any claim if it should happen that a note so cashed was a stolen note. In the present case there was no such obligation on the Poddar, and though the result of an order, directing him to give it up to the person from whom it was stolen, would seem to be somewhat unreasonable, it is, in my opinion, in accordance with our law in

India, and therefore I feel bound to submit the matter for the orders of the Honourable High Court."

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IN THE
MATTER OF
CAPTAIN
MICHELL,
Petitioner.

The judgment of the Court (1) on the matter submitted is as follows:—

Judgment.

We think the Sessions Judge might have disposed of this case under section 419 of the Criminal Procedure Code without a reference to this Court. The words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case that the question of the propriety of an order, under section 418; for the disposal of any property produced before the Court, may in no way concern the convicted person, and we think it unreasonable to put such a construction on section 419 as shall make the power of the Judge to modify, alter, or annul a Magistrate's order affecting one party contingent on the accident whether another party has or has not chosen to appeal.

Section 286, by the words "except in the cases provided for by this Act," must include cases in which the power to alter or annul the order of a Magistrate is expressly given.

We are further of opinion that the case does not call for our interference. It is admitted in the order of reference that the note came honestly into the hands of the Poddar to whom it has been returned by the Magistrate. The Sessions Judge refers to section 108 of the Indian Contract Act, and to the definition of "goods" in section 76 of the same Act, in which, for the purposes of that particular chapter dealing with contracts of sale, the word is defined.

No one has appeared to argue the points raised before us. As at present advised, we are of opinion that the provisions of the Contract Act do not apply to this case. The change of a Government currency note for money is no more a contract of sale than the payment of the same note over the counter for goods is a sale of the note for the goods; in this last case the note is paid as money, being legal tender for the amount expressed therein under section 15, Act III. of 1871. Section 77 of the Contract Act defines sale to be the exchange of property

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MICHELL,
Petitioner.

Judgment.

for a price; but this is the exchange of money in one form for money in another form. Either form being a legal tender, it is impossible to say that one is the price of the other. If we are to look to section 76 of the Contract Act, we must read it with section 77, and this latter section shows that the provisions of that Act do not apply in this case.

[EXTRAORDINARY CRIMINAL JURISDICTION.]

RAJCOOMAR SINGH AND ANOTHER, } PETITIONERS;
 CONVICTS

1878
 Jan. 18.

AND

DINO NATH GHUTTUGK OPPOSITE PARTY.

High Courts Act, section 15—Extraordinary powers of High Court—Right of appeal in ordinary course.

When there is the right of appeal provided by law, the High Court will not exercise its extraordinary powers under section 15 of the High Courts Act—all other remedies provided by law must be first exhausted.

THE petitioners, who had been sentenced by the Joint Magistrate of Serampore under section 147 of the Indian Penal Code, each to three months' rigorous imprisonment, and also to give security in Rs. 100 to keep the peace for one year, made an application to the High Court, for the exercise of its extraordinary powers under section 15 of the High Courts Act, and obtained a rule (WHITE and McDONELL, JJ.) calling upon the complainants to show cause why those orders should not be set aside.

Branson and Hill, for the Petitioners, referred to *The Queen vs. Biron Ayah*, 21 W. R. 64; 13 B. L. R. 4, App.

J. D. Bell, for the Opposite Party.

The following judgments were delivered by the High Court (1):—

AINSLIE, J. :—

AINSLIE, J.

Mr. Justice WHITE has expressed a wish that this matter should be disposed of by this Bench.

I am of opinion that this Court cannot interfere in the exercise of its powers of extraordinary jurisdiction unless every other remedy provided by law has been exhausted. The petitioner in this case clearly has the remedy of an appeal. Therefore, until that remedy has been resorted to, this Court, in the view I take of the proper

(1) AINSLIE and McDONELL, JJ.

[CRIMINAL.]

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GHUTTUCK.*Judgment.*

application of section 15 of the High Courts Act, ought not to interfere. Whether under any circumstances it would do so I need not say. The rule will be discharged.

I concur in the suggestion of my learned brother as to the propriety of admitting an appeal should the petitioners think fit to tender it, and in suspending the execution of the Magistrate's order for one week from this date.

MCDONELL, J. :—

I would only add that Mr. Justice WHITE entirely concurs in the view taken by my learned brother AINSLIE, and that, had it been brought to our notice that there was an appeal, we should not have granted the rule. At the same time we think that the Judge would exercise a wise discretion if, under the circumstances, he would admit the appeal after time.

The applicants are at present on bail, and, if they do not appeal within one week from this date, the sentence will be carried out.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CHUNDER SEEKOR } PETITIONERS;
 SOOKUL AND OTHERS }

1878
 Jan. 7.

AND

DHURM NATH TEWARÉE

. OPPOSITE PARTY

*Summary trial—Section 222, Code of Criminal Procedure—Jurisdiction—

 Section 34, cl. iv.*

Where, on the facts found by a Magistrate, an offence is established which he cannot try summarily, he is not competent to convict for an offence made up of only some of those facts in order to give himself jurisdiction. Such proceedings are void under section 34, cl. iv., of the Code of Criminal Procedure, because he was not empowered by law to try the offender summarily.

Mr. C. Gregory, for Petitioners.

Mr. R. E. Twidale, for Opposite Party.

The facts of this case sufficiently appear in the judgment of the High Court (1), which was delivered by . . .

AINSLIE, J. :—

AINSLIE, J.

This matter has been brought before the Bench taking the criminal business of this Court, by order of the Judge in the English department in consequence of it appearing on the monthly statement of the Magistrate that this was probably a case in which the Magistrate had gone beyond the law in holding a summary trial. The papers of the case were sent for, and it appears from the judgment of the Magistrate himself that the proceedings are bad. The conviction is recorded as, under section 143 of the Indian Penal Code; but in the course of his reasons for the conviction, the Magistrate, among other things, says that "the assemblage of accused armed with swords and with a mob at their heels, and their destruction by ploughing up the indigo sown on fourteen bighas, have been established."

Now, taking it that the conviction was right on the merits, the

(1) AINSLIE and McDONELL, JJ.

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fact that the Magistrate has found that the accused went armed with swords, brings the case under section 144 of the Penal Code; and it is quite clear that no Magistrate is entitled to cut down an offence from that which is established by the evidence in order to give himself summary jurisdiction. Having, as he says, evidence before him which shows that an offence, not triable summarily, had been committed, he was bound to try the accused for the offence in the ordinary way. He was, therefore, not empowered by law to hold summary proceedings in this case. That being so, the Court is compelled, under clause 4 of section 34 of the Criminal Procedure Code, to declare his proceedings void.

The whole of the proceedings and the orders made in this case must be quashed, and the Magistrate directed to proceed de novo. If any fines have been realized, the Magistrate must repay them to the parties by whom they were paid.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CHINIBASH GHOSE . . . CONVICT.

1878
Jan. 10.*Examination of the accused—Code of Criminal Procedure (Act X. of 1872), section 250.*

Under section 250 of the Code of Criminal Procedure, the Court may, from time to time, at any stage of the case, examine the accused personally ; but the Court is not competent to subject the accused to severe cross-examination. The discretion given by the law is not to be used for the purpose of driving the accused to make statements criminating himself ; but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that these facts should not stand against him unexplained.

• *Virabuddra Gaud*, 1 Mād. 199, quoted and followed.

CASE referred by the Sessions Judge of Hooghly for confirmation by the High Court of the sentence of death passed by him on conviction of the prisoner of murder by the verdict of a Jury.

The facts of this case sufficiently appear from the following judgments of the High Court (1) :—

KEMP, J. :—

KEMP, J.

The prisoner has been convicted of the murder of a prostitute named Soorut. A majority of four out of five of the Jury convicted the prisoner under section 302 of the Indian Penal Code. The Sessions Judge concurs in that conviction, and has sentenced the prisoner capitally, subject to the confirmation of this Court.

• We observe, in this case that, before the evidence for the prosecution was recorded, the prisoner, Chinibash Ghose, was subjected to a very searching cross-examination. Now, under section 250 of the Code of Criminal Procedure, the Court may, from time to time, at any stage of the case, examine the accused personally ; but it has been held by the Madras High Court (*Virabuddra Gaud*, 1 Mad. 199) that the Sessions Court is not competent to subject the

(1) KEMP and MORRIS, JJ.

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MATTER OF
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KEMP, J.

accused to severe cross-examination; that the discretion given by the law is not to be used for the purpose of driving the accused to make statements incriminating himself; and that it can only properly be used for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that those facts should not stand against him unexplained.

Now, although there is no doubt that, as already stated, the Sessions Judge was competent, under the provisions of the above-mentioned section, to examine the accused, we think that he has gone far beyond the powers vested in him under section 250. In this particular case the examination of the prisoner extends over several pages, and he was cross-examined in a most severe manner before the case for the prosecution was even opened.

The charge of the Judge to the Jury is open to several objections. In the first place, it is not so much the charge of a Judge who is summing up the evidence, and leaving the weight of that evidence to the Jury to judge of, but it is more like the summing up of an advocate on the part of the prosecution. Every point is taken against the prisoner, and many points in his favour are omitted. It is true that some points in his favour are alluded to by the Judge, but he alludes to those points for the purpose of immediately neutralising their effect by placing his own views on those points before the Jury, instead of leaving the points in favour of the prisoner to the consideration of the Jury.

One of the points in favour of the accused, and this is a material point, is very cursorily alluded to in the charge; namely, the fact that the body of the woman Sooraj was found immediately after the occurrence of the murder, or within an hour or so, covered with blood. The police-officers also describe the room in which the murder occurred as being here and there bespattered with blood. The prisoner, on his being arrested within an hour of the occurrence, is found to have marks on his clothing, which were supposed by the police to be marks of human blood. Now, his *dhotee*, or other clothing, was sent down for examination by the Chemical Examiner to Government; and that officer has reported that those marks were not marks of blood.

This fact, which is one of the points in favour of the prisoner,

is not placed as prominently as it should have been before the Jury. We now come to the consideration of the case itself. It appears to be clear that Chinibash, the accused, used to visit the woman Soorut. He had known her for some two years before the crime was committed; but his visits were not approved of by the witness Komul, who, describes herself to be a bawd, under whose protection the woman Soorut lived. Komul tells us that she objected to the prisoner visiting Soorut, her girl, because he was not a good paymaster, and because his visits interfered with the visits of other parties in a better position to pay for the services of the deceased. In this case there appears to us to be no reasonable motive for the cruel murder with which the accused has been charged. Absence of a known motive is not, of course, sufficient to establish the innocence of the accused, but it is an important element in a case of this description, where we find a woman brutally murdered—for the medical officer deposes that she had seven severe wounds on the upper part of the body, *viz.*, the head, shoulders, and neck, and that the spinal cord was severed.

The murder of this woman took place between the hours of seven and nine in the evening in the town of Budesshur. The house in which Soorut lived is in that town, and it is in evidence that there are several houses occupied by prostitutes and others in the immediate vicinity of that house. The constable, Lutchmun Patuck (whose lodgings are also within a very short distance—a few cubits only—from the house of the deceased), states that he heard a *golmal*, and that he rushed to the house of Soorut, that he was very much agitated and confused at the sight of the body of the murdered woman; and that he does not remember whether the women (that is to say, the witnesses Komul Boishtomee, Mon Mohinee, Raneer Tamulinee, and Khettro Mohinee) mentioned, at the time, the name of the accused as the murderer of the woman Soorut. The constable proceeds to the police-station immediately after viewing the body of the deceased, and arrives at that station within a very short time (less than an hour after viewing the body), and in his first statement to the police (and this is always an important matter in a case of this description) he says that the name of the murderer is not known.

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KEMP, J

The women who have been mentioned above all depose that they clearly mentioned to the constable, Lutchmun Patuck, the name of Chinibash as the party whom they had seen, rushing from the premises of the woman Soorut immediately after they heard the groans of the deceased.

It has been attempted to account for the fact, that Lutchmun Patuck did not mention the name of the accused, by stating that he is an up-country man, a resident of the Benares district, and that he is not well acquainted with the Bengali language.

Now, that the constable knows the Bengali language is clear; for in his evidence he admits that he understood the women to say *Khoon hoyache, khoon hoyache*; and *Ei, kãtya palya gyache*; and again, Shunker, who accompanied the constable to assist him in the apprehension of the prisoner, deposes that the constable made use of the following words when he, the witness Shunker, said that he thought it was unnecessary to bind the hands of the accused: *Eto bora lok teen jon dhorite hoibe*. From this it appears to us clear that Lutchmun Patuck well understood the Bengali language. Further, we find from his evidence that he was personally acquainted with the accused previous to the occurrence of this murder; for he deposes that he met the accused on the day of the murder, and that the accused proposed to him, the constable, to accompany him on a visit to Benares. He further states that he observed on that occasion that the prisoner had an umbrella in his hand; that it was of a pink colour; that one of the ribs of that umbrella stuck out of the cover; and that that circumstance attracted his attention. Now, a pink umbrella was found in the house of the murdered woman, and Lutchmun Patuck has deposed that that was the umbrella of the accused. There is also another witness who mentions that umbrella; but that witness is unable to speak with any certainty as to the ownership of the umbrella.

The identification of this umbrella by Lutchmun Patuck seems to us to be open to much doubt. It is difficult, too, to understand how the prisoner could have taken this umbrella to the house of the deceased, Soorut, on the evening of the murder; for when he was arrested very shortly after the murder, another and a very different umbrella was found in his possession. The evidence of

Shunkur, as well as that of the constable, Lutchmun Patuck, tends to prove that the prisoner was arrested when on his way home from the scene of the crime. It is not suggested how he found, or that he picked up, the umbrella that was found in his possession; we are, therefore, forced to the very unreasonable conclusion that the prisoner took two umbrellas with him to the house of Soorut, and took away only one of them, one which had in no way been previously identified, and left the pink one which the constable professes to have seen with the accused previous to the occurrence of the murder.

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Then there is another very peculiar feature in this case, namely, that, although those four women profess to have seen the accused running away from the house of the deceased immediately after the murder, and although they state that they mentioned the name of the accused to the constable as well as to the police immediately on the arrival of that officer and the police on the scene of the murder, yet the Assistant Magistrate, who committed this case, thought proper to take proceedings against two other parties, namely, Bhoot Nath Pal and Koonjoo Telee, who were also in the habit of visiting the deceased Soorut. These two men were *chalanned* by the police, and were called upon to prove their whereabouts on the night of the murder. Evidence was gone into in support of their respective defences; and, in the case of Bhoot Nath Pal, the Assistant Magistrate went so far as to make him produce the account-books of a connection of his (who keeps a shop) to substantiate his defence.

Now, it is clear that, if these women were speaking the truth and had seen the accused, Chinibash, rushing out of the house of Soorut immediately after the commission of the murder, and if the police were in possession of the name of the murderer within a very short time after the occurrence of the crime, it would have been unnecessary for them to have *chalanned* Bhoot Nath Pal and Koonjoo Telee. Then there is another fact in the case which is deposed to by the head constable, namely, that, when the constable, Lutchmun Patuck, was deputed to apprehend the accused, the head constable sent Shunkur and another man with him in order to identify the accused. Now, as already stated, the constable, Lutchmun Patuck, admits that he knew the accused, that he had

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conversed with him on the day of the murder, and that he had observed the umbrella which was then in the hands of the accused, and therefore it was wholly unnecessary, supposing that the convict is speaking the truth, to depute any person for the purpose of assisting him in the identification of the prisoner.

After careful consideration of the whole of the evidence in this case, we are not satisfied that the prisoner is guilty. We therefore acquit him on the charge on which he has been convicted by the Sessions Judge, and direct his immediate release.

MORRIS, J. MORRIS, J.:—

I think that many circumstances in favour of the prisoner have not been properly laid before the Jury; and so much suspicion attaches to the evidence which connects the prisoner with the crime that I concur in directing his acquittal.

[CRIMINAL REVISIONAL JURISDICTION.]

[FULL BENCH.]

IN THE MATTER OF BAIDYANATH DASS .; (CONVICT).

Act XXI. of 1856, section 49—Confiscation—Fine—Summary trial—Code of Criminal Procedure, section 222.

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Feb. 18.

The confiscation which is provided for by section 49, Act XXI. of 1856, is merely a consequence of the conviction, and does not form part of the punishment for the offence. An offence under that section, which is punishable with fine, may, therefore, be tried summarily by a Magistrate under section 222 of the Code of Criminal Procedure, Act X. of 1872.

, *Khetter Mohun Chowringi*, 22 W. R., Cr., 43, and *Juddoo Nath Shaha*, 23 W. R., Cr., 33, overruled.

THIS case was submitted to the High Court by the Officiating Sessions Judge of Rungpore, with a recommendation that the order of conviction and sentence passed by the Magistrate on Baidyanath Dass be quashed, on the ground that the Magistrate had tried the case summarily, the offence being one which could not be so tried under section 222 of the Code of Criminal Procedure. The facts of the case were these. The prisoner was charged with the illegal possession of ganja. He was tried summarily before the Magistrate, convicted, and sentenced to pay a fine of Rs. 200. The Magistrate further directed that the ganja found in the prisoner's possession should be confiscated.

The Division Bench (MARKBY and PRINSEP, JJ.) referred the case to a Full Bench in the following terms:—

"The matter which remains for our decision is, whether an offence under section 49, Act XXI., 1856, can be tried summarily by a Magistrate under section 222 of the Code of Criminal Procedure.

"The punishment for that offence (on which this matter depends) is thus described: The offender 'shall forfeit for every such offence a sum not exceeding Rs. 200.' It is further stated, 'and the liquors and drugs, together with the vessels, packages,

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and coverings in which they are found, and the animals and conveyances used in cartying them, shall be liable to confiscation.'

"Section 222 of the Code declares that the Magistrate of the District may try certain offences in a summary way, and among these offences are 'offences referred to, in section 148 of this Code.' Such offences are described in the Code (section 4) as '*summons cases*.' Section 148 is to the following effect: 'When a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate and punishable with fine only, or with imprisonment for a period not exceeding six months, or with both., the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint.' So only offences punishable with 'fine only or imprisonment for a period not exceeding six months, or with both,' would be triable in a summary way under the first clause of section 222, already quoted.

"Is an offence under section 49, Act XXI., 1856, one punishable *with fine* only; or does the confiscation which follows on conviction form a part of the punishment so as to alter the character of the offence as regards the mode of trial to be adopted?

"In two reported decisions of this Court (*Khetter Mohun Chowringi*, 22 W. R., Cr., 43; *Juddoo Nath Shaha*, 23 W. R., Cr., 33) it has been held that such offences are not summons cases, and therefore are not triable in a summary way, because they are punishable with confiscation as well as with fine. We have great doubts regarding the correctness of those decisions—doubts which, we would add, are shared by the only Judge of this Court now present who was a party to one of those decisions. We are informed that Magistrates constantly try offences of this description summarily, probably in ignorance of the rule laid down in these decisions, and we therefore think it right to submit the matter to be authoritatively settled by a Full Bench of this Court. We are inclined to hold that such an offence can be tried summarily, as a '*summons case*,' for the following reasons, which we state because the parties to this case

are unrepresented, and therefore it is not probable that there will be any argument at the bar.

"For the procedure in the trial of offences, the Code has divided them into three classes—summons cases, defined in section 148; warrant cases, defined in section 149; sessions cases or trials in the Court of Sessions defined in section 4. If the offence under section 49, Act XXI., 1856, is not a summons case, it must be either a warrant case or a sessions case; and whatever opinion may be expressed regarding its falling under the category of summons cases, it clearly cannot fall within either of the two other classes. No special mode of trial has been prescribed for such an offence, and it is difficult to suppose that such cases were overlooked by the Legislature. The proper solution of this difficulty seems to be to regard confiscation not as a punishment contemplated by the Code of Procedure so as to affect the mode of trial.

"It may be said that a sentence is the declaration of the punishment imposed. Section 20 of the Code of Criminal Procedure sets forth the powers of Magistrates in passing sentence, and these powers are limited to imprisonment, fine, and whipping. It is in consideration only of such punishments that the Code has prescribed the different modes of trial; and, though confiscation of certain articles may be awarded on conviction of any offence under a special or revenue law, such confiscation is not taken into account by the Code so as to form a portion of the sentence or to affect the nature of the offence or the mode of trial. Further, we observe that section 8 of the Code, in providing for the trial of offences under local or special laws, states that 'no Court shall award any sentence in excess of its powers;' and 'the powers of Magistrates in respect to passing sentences on persons convicted' are set forth in section 20, which, as already stated, only refers to three kinds of punishments—imprisonment, fine, and whipping. Confiscation under Act XXI., 1856, and also under the Salt Act, can, however, be ordered by a Magistrate. Under these circumstances, we are inclined to hold that confiscation is no part of the sentence or punishment under the Code of Criminal Procedure, but that it follows as a consequence of the conviction.

"The question referred is that stated in the first paragraph of this reference. If the answer to the question be in the affirmative,

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Reference.

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the conviction will stand. If the answer be in the negative, the conviction and sentence, including the order of confiscation, will be set aside, and a new trial ordered."

Judgment.

The judgment of the Full Bench (1) is as follows:—

We are clearly of opinion that an offence under section 49, Act XXI., 1856, can be tried summarily by a Magistrate under section 222 of the Criminal Procedure Code. The confiscation, which is provided for by section 49, is merely a consequence of the conviction, and does not form part of the punishment for the offence. We observe that in the case of *Khetter Mohun Chowrungi*, 22 W. R. 43, to which we are referred, the question which we are called upon to decide was given up by the Government Pleader without argument, and that, in the second case, the learned Judges merely followed the ruling in the first. So that this would appear to be the first occasion on which the point has been seriously considered.

(1) GARTH, C.J., KEMP JACKSON, MARKBY, and AINSLIE, JJ.

[CRIMINAL REFERENCE.]

IN THE MATTER OF RAM MANIKYA CHUCKROBURY
AND OTHERS.1878
Jan. 17.*Code of Criminal Procedure, section 453—Joinder of charges—Several offences committed.*

Section 453 of the Code of Criminal Procedure is not to be construed as meaning that, no matter how many offences of the same kind a man may commit within one year, he may not be prosecuted for more than three. He may be separately tried for other offences.

THIS was a reference from the Sessions Judge of Noakhally. The facts are set forth in his report, which is as follows:—

“Ram Manikya Chuckrobury, Goluck Chowkeedar, and five others petitioned under section 295 of the Code of Criminal Procedure, on the ground of illegality and irregularities in their trials. The conviction arose out of the following circumstance: Last *Churuk Puja* the villagers of Bassura (in Chagulnya Thanna) got up a mock swinging performance, the swingers being stained with pigeon's blood and the hook not passing through the flesh. The police stopped it and a *mélée* ensued, and the police got assaulted.

“Subsequently the Sub-divisional Magistrate, Baboo Saroda Prosad Sarkar, with 2nd-class powers, himself went out and investigated the case. The record shows there was some misconduct on the part of the police, but this Court has no other cognizance of it, and no further reference to it is needed. Many persons were accused of attacking the police, and it transpired subsequently that money had been given freely to escape implication.

“The petitioners were charged with extorting bribes from the villagers through threats of being chalanned. The Deputy Magistrate had this matter investigated likewise, and ten cases were sent up as proven. In eight thereof Ram Manikya was sentenced, and in five Goluck, for taking sums from the country people. The former is what is called a ‘toorney,’ that is, an unlicensed village mooktear.

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"They appealed to the District Magistrate unsuccessfully. They then petitioned this Court to call for the records. This was before the vacation, but by the formal request of 'petitioners' vakeels the hearing was adjourned till after the Pujas, as the pleaders went to their homes. As this Court has nothing to do with the merits of the case, but it is its province under Chapter XII. only to look to regularity and legality or otherwise of the proceedings, I need only say that it cannot be said there is no evidence, nay, that the evidence is sufficient. Hence, no reference is called for on the ground of no evidence, which, it has been ruled, comes under 'irregularity.'"

"Next, as to the legality or regularity in other respects. In the grounds for this petition many objections are urged; but at the hearing they, on analysis, vanish and are abandoned, except these two: (1) That the convictions in excess of three are illegal and contrary to section 453 of the Code of Criminal Procedure; and (2) that the Deputy Magistrate was personally interested on account of the damage suit against him. The second it will be convenient to discuss first.

"In the course of the trial a suit was filed on 15th of June against the Deputy Magistrate by Ram Manikya for Rs. 200 in the Civil Court, on the allegation that the Deputy Magistrate had used abusive language to the accused by calling him a *Badzad*. On 16th of June, the very next day, application was made by accused to the Deputy Magistrate to transfer the case elsewhere, on the ground that he (accused) had filed that suit. This was refused, and repeated also unsuccessfully before the District Magistrate. [It may be mentioned incidentally that the damage suit resulted in an award of Rs. 10 damage, without costs, to the criminally accused (the civil plaintiff), and the Civil Court found the defendant, the Deputy Magistrate, had used the expression, and was of course wrong in so doing, but that the plaintiff had, by his own conduct in trying to conceal himself behind his fellow prisoners, from an identifying witness, given rise to the language.]

"Now, as the alleged interest in the criminal case was no antecedent interest, and as it would be obviously very undesirable that a criminal accused should, by filing a civil suit during the pendency of his criminal case, procure a fresh trial, I hold

the criminal trial was not vitiated; and I note further, that the District Magistrate directed the Deputy Magistrate to retain and finish the case.

"The other ground for this motion, however, that the convictions are illegal in view of section 453, must be held fatal. These convicts have been sentenced for eight and five extortionate acts, respectively, occurring about the same date. The acts are of the same kind, nay, the very same, viz., extortion; and the prisoners have been charged and tried at the same time (viz., 31st of July and 1st and 3rd of August). It cannot be doubted that if they had committed one hundred acts of extortion within one year of each other they would be liable to be charged and tried at the same time for three only.

"The Deputy Magistrate's explanation is annexed, but it appears to this Court he mistakes the law. He has—his sentences show—only had in view section 314, convictions 'at one trial.' The punishments aggregate a few days short of double his powers."

The judgment of the High Court (1) is as follows:—

We see no grounds for interfering. Section 453 of the Criminal Procedure Code modifies section 452, which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind, and committed within one year of each other, to be tried at the same time. But this does not mean that, if at one time or within one year a man commits fifty distinct offences of the same kind, he shall not in one day be prosecuted for more than three such offences. This is clear from illustration (b), section 454.

(1) AINSLIE and McDONELL, JJ.

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MANIKYA
CHUCKRO-
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OTHERS-
Judgment.

[CRIMINAL APPELLATE JURISDICTION.]

1878
Feb. 0.

SHAMJEE NASHYO APPELLANT.

Section 75, Indian Penal Code—Second conviction—Sentence.

Where, soon after his release on expiry of a sentence of seven years' imprisonment on conviction of "receiving stolen property acquired by dacoity," a person is convicted of house-breaking and theft, he is sufficiently punished by a sentence of seven years in transportation; a sentence of transportation for life is too severe.

It is not the intention of the Legislature that a previous conviction should so enormously enhance the heinousness of petty offences.

CRIMINAL APPEAL against the order of the Sessions Court of Dinagapore, convicting the appellant under sections 457 and 380 of the Indian Penal Code of house-breaking by night in order to commit theft, and of having committed theft in a dwelling-house, having been previously convicted of dishonestly receiving stolen property acquired by dacoity (section 412), and sentencing him to transportation for life under section 75.

The facts of this case are sufficiently set forth in the following judgment of the Sessions Judge:—

"The prisoner is charged with house-breaking with intent to commit theft, and again with theft in a dwelling-house, being an old offender. The Assessors would acquit on the first charge. On the second, one would acquit, and the other would convict. I agree with the latter in preference to the former. The case is a very simple one. The prisoner's own statement corroborates the story for the prosecution, which there is, generally, no reason for doubting. It is a case requiring few words. When a man, who has only recently come out from a seven years' incarceration, is found so soon erring as in the present case, it is clear that he is a man who ought to be put beyond the reach of temptation, for his own sake, and for the sake of the community. In such a case limited imprisonment would seem to be an unsuitable punishment, and I do not think that transportation for life is more than should be awarded. The prisoner Shamjee Nashyo is sentenced to transportation for life."

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SHAMJEE
NASHVO.

The judgment of the High Court (1) was delivered by
JACKSON, J. :—

Judgment.

JACKSON, J.

The prisoner was properly convicted, but the sentence appears to us to be greatly beyond the requirements of the case. His offence was that, in company with two others, he had stolen some articles of trifling value, a theft which under ordinary circumstances would have been adequately punished with a few months' imprisonment. But he had previously been convicted of receipt of property acquired by dacoity, and had undergone a sentence of seven years' imprisonment. For this reason the Sessions Judge, under the provisions of Section 75 of the Indian Penal Code, has sentenced the prisoner to transportation for life. We think it was not the intention of the Legislature, and is not in accordance with reason, that a previous conviction should so enormously enhance the heinousness of petty offences. We reduce the sentence to one of seven years, and, in deference to the opinion of the Judge, we commute the imprisonment to transportation.

(1) JACKSON and CUNNINGHAM, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

1878
Feb. 12.

AMEENOODEEN APPELLANT.

Section 217, Indian Penal Code—Nature of such offence.

To constitute an offence under section 217, Indian Penal Code, it is not necessary that there should be proof that the person whom the public servant intended to save from legal punishment had committed an offence, or was justly liable to legal punishment.

Queen vs. Jeynarain Patro, 30 W. R., 66, distinguished.

CRIMINAL APPEAL from an order passed by the Sessions Judge of Backerganj, sentencing the appellant to two years' rigorous imprisonment and to a fine of Rs. 100, or, in default, to six months' further rigorous imprisonment, for offences under section 218 of the Indian Penal Code.

The following facts were established in the Sessions Court:—

Adhuri Dhapa caught Radha Churn Dhapa with his wife, and cut off his ear. On 28th July Radha Churn made a complaint to the police-station, in charge of which the appellant was the head-constable. He failed to enter the fact in the police-diary or to report it, but hushed it up, inducing the parties to come to a compromise.

On the 8th August, as Radha Churn became worse, the head constable, appellant, recorded the statement of Maddon, the brother of Radha Churn, as a first information to the effect, that his brother had fallen from a "Tong," and split his ear; and that, as he had not improved under the care of a *kobiraj*, he should be sent to the hospital for treatment, which was done. Shortly afterwards Radha Churn died of tetanus.

The appellant was accordingly tried and convicted by the Sessions Judge in concurrence with the assessors of having, when in charge of Gournuddy police-station as head constable, induced Radha Churn Dhapa to compromise his case, and, in further violation of his duty, in having suppressed the fact that Radha Churn came to complain on the 20th July, and so framed an incorrect record with the view to screen Adhuri Dhapa from legal punish-

ment, being offences punishable under sections 217 and 218 of the Indian Penal Code.

The Sessions Judge also, but differing from the assessors, convicted the appellant of having, on the 8th and following days of August, framed his special diaries in an incorrect manner, with the intent, or knowing it to be likely, that he could screen Adhuri Dhapa from legal punishment.

M. M. Ghose and Moonshee Serajul Islam, for Appellant.

The following judgment of the High Court (1) was delivered by

JACKSON, J. —

JACKSON, J.

It has been pressed upon us in this appeal that the prisoner has not been duly convicted under section 217 of the Indian Penal Code, because there was not before the Court, upon the present trial, any evidence to show that in the point of fact an offence had been committed, still less that such offence had been committed by the person in respect of whom the wrongful act of the police officer, the prisoner, had been done. What appears is, that a person named Adhuri Dhapa was charged before the Court of Session, and was tried and acquitted of an offence, the act of offence charged being the cutting off of somebody's car, and it appears that the particular act which the prisoner in this case had committed, and which amounted to knowingly disobeying a certain direction of the law as to his conduct, as a public servant, had a tendency to save a person, namely, the person charged as first stated, from legal punishment. It appears to me quite sufficient for the purpose of a conviction under section 217 that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment. It appears to me certain that a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was

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AMEEN-
OODEEN,
Convict.

Judgment.

(1) JACKSON and CUNNINGHAM, JJ.

1878

AMKEN-
OODHEEN,
Convict.

Judgment.

JACKSON, J.

founded upon a mistaken belief as to that person's liability to punishment. We have been pressed with a case in which I myself gave judgment — the case of *Queen vs. Foyanarain Patro* in 20 W. R., page 66. It is not necessary for us at present to consider whether that judgment was right, because the section on which that case turned was wholly different from the section now under consideration. That is a section under which any member of the community is punishable; and it is one under which the essence of the offence is that the person to be dealt with must know or have reason to believe that an offence has been committed. This is an offence applying only to public servants, and an act of a certain kind is made punishable as an offence when such act is done knowingly against the direction of the law, and with the intention of saving a person from legal punishment, whether the person so intended to be saved from punishment had committed the offence or not. I think, therefore, that the conviction in this case was right, and that the appeal must be dismissed.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF SHONAI PARAMANICK . . PETITIONER;

1878
Feb. 12.

AND

JOGENDRO SHAHA AND ANOTHER OPPOSITE PARTY.

Section 521, Code of Criminal Procedure—Power to withdraw order passed—Value of evidence—Court of Revision.

When after enquiry a Magistrate finds that there is no sufficient cause for proceeding under section 521 of the Code of Criminal Procedure, he is competent to let the matter drop.

As a Court of Revision, the High Court will not enter upon a consideration of the value of the evidence on which the Magistrate decided so to act.

THIS was a case referred by the Sessions Judge of Rajshahye to the High Court, as a Court of Revision, for the reversal of an order of the Magistrate in charge of the Division of Nattore, refusing to proceed with a matter under section 521 of the Code of Criminal Procedure.

The facts of this case were thus stated by the Sessions Judge:—

“A petition was presented to the Assistant Magistrate of Nattore by one Shonai Paramanick, complaining that Shāma Sundari Chowdhrani and Jogendro Shaha had obstructed a public thoroughfare in his village. This petition was made over for decision by the Assistant Magistrate to a Sub-Deputy Magistrate, who returned it to him as beyond his powers. It appears to have been then made over to the police for enquiry, by an order dated 28th February 1877 (though the order of the Sub-Deputy returning it to the Assistant Magistrate is dated 29th February). The police report has no order on it, but a petition of objection of the opposite party bears an order to the effect that the party petitioned against is to open the road within a week, or to appear and show cause against doing so. The next order, on a petition for a second investigation, is, that the Sub-Deputy should investigate. This he did, and made a report after taking the statements of witnesses to the effect that the road was not a thoroughfare, but a private road.

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IN THE
MATTER OF
SHONAI
PARAMANICK

v.
JOGENDRO
SHAH AND
ANOTHER.

—
Statement.

"On inspection of this report, the Assistant Magistrate directed that the case should remain in the sherrista. The petitioners apply to have the case referred; their principal grounds being (1) that the Assistant Magistrate should not have referred the case for investigation to the Sub-Deputy, and disposed of it on his report merely; and (2) that the materials before the Sub-Deputy showed that the road was a public thoroughfare.

"With regard to the first point, I think the Assistant Magistrate erred. By section 521, Criminal Procedure Code, he was empowered to issue an order to the persons complained against to remove the obstruction, or to show cause against doing so. This he did, and it must be presumed that he was, before doing so, satisfied of the necessity for such order. Having done this, he was required, on the appearance before him of the persons complained against, himself to 'take evidence in the matter' (section 525). Instead of this, however, he made over the case, to the Sub-Deputy Magistrate, and passed an order on his report.

"As to the second point, the evidence taken by the Sub-Deputy is, as usual in such cases, very conflicting, but it certainly seems to me that it establishes the existence of a 'public thoroughfare,' *i. e.*, a thoroughfare used at will by the section of the village community living in a certain part of the village. However, I think the first point taken is sufficient to vitiate the proceedings, the Assistant Magistrate having clearly departed from the provisions of the law as to the manner in which the case should have been disposed of."

The following order was passed by the High Court (1):—

We think that there are no grounds in this case for the exercise of our powers of revision. The Magistrate having satisfied himself that there was no cause for acting under section 521, was, in our opinion, at liberty to let the proceedings drop. As to the second ground, the propriety of the finding is not a matter for our consideration.

(1) JACKSON and CUNNINGHAM, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

KALEE BEPAREE AND OTHERS, APPELLANTS,

1878
Mar. 5.*Rioting—Attacking party—Right of private defence.*

Where both parties are armed and prepared to fight, it is immaterial who is the first to attack, unless it is shown that that party was acting within the legal limits of the right of private defence.

CRIMINAL APPEAL from an order of the Sessions Judge of Backerganj, convicting and sentencing the appellants on a charge of rioting, armed with deadly weapons, under section 148 of the Indian Penal Code.

Baboo *Doorga Mohun Dass* for the Appellants.

The facts of this case are sufficiently set forth in the judgment of the High Court (1), which was delivered by

JACKSON, J. :—

JACKSON, J.

The case against the prisoners, appellants, was, that they had been respectively concerned in an affray in which a person named Rohimooddeen was wounded with a spear and killed, and they were charged under sections 302 and 149 of the Penal Code ; but, in consequence of the evidence, which, in the opinion of the Court of Session, was not sufficiently strong to support a conviction on those counts, they were convicted only, under section 148 of the Penal Code, of rioting armed with deadly weapons, and sentenced, each of them, to rigorous imprisonment for three years.

It is contended for the appellants that, in the condition of the evidence given before the Court of Session, the appellants ought not to have been convicted at all, and it is pressed upon us that the Judge has altogether disbelieved most of the witnesses for the prosecution, and that he relies entirely upon a single witness named Gholam Nubi, who, however, has not adhered to the same story throughout, but has contradicted himself ; and it is contended that he therefore ought not to be believed. Now, it seems to us that the appellants' pleader is mistaken as to the

(1) JACKSON and CUNNINGHAM, JJ.

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JACKSON, J.

view taken by the Judge of the evidence for the prosecution generally. I do not understand that the Judge altogether disbelieves and rejects that evidence, but that he disbelieves it in so far as it gives colour to the case which would establish aggression and guilt on the part of one of the contending parties only, and the entire innocence of the other. In that respect the Judge certainly does not believe the evidence, and I see very little reason to doubt that the Judge is right. There is good reason to believe that on both sides there was irritation and also determination to resort to force to support the rights and wishes of the parties, and the Judge expressly says that it appears from the evidence (and it must be taken therefore that he believes it in that respect) that there had been preparation on both sides for an armed encounter. It is not denied that the evidence of the witnesses generally goes to show that these four persons were engaged in the encounter which resulted in the death of Rohimooddeen. As to the evidence of Gholam Nuh, the Judge expressly says that he came into the box with the determination of suppressing circumstances which would tell against his own landlord, but that being pressed, he was compelled to admit the whole truth, and therefore did admit that on the side of the landlord as well as on the side of the confederate ryots there was use of force, and consequently mutual affray. He expressly says that these four persons were engaged in the affray, and I do not find that the cross-examination which followed was at all directed to show that his statement in that respect was untrue. The appellant's pleader, I have no doubt, had good reasons for not laying before us the defence raised in favour of the prisoners; and it is obvious that what they really sought to do was not so much to show they were entirely free from blame, or were not present on that occasion, but merely that they were not the attacking party. That, under the circumstances of this case, makes no difference, because it is not attempted to show that they were acting within the legal limits of the right of private defence; and it does not matter, where both parties are armed and prepared for battle, which is the first to attack. Both sides are equally culpable. I therefore think that this appeal must fail.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF UJJALA BEWA.

1878
Mar. 12.

*Code of Criminal Procedure, section 142—Indian Penal Code, Chapter XX.,
section 494—Jurisdiction—Complaint.*

A complaint was made to a Magistrate accusing a certain person of having taken or kept the wife of the complainant. In the course of the proceedings it appeared that the wife had committed bigamy (section 494, Indian Penal Code). The Magistrate, without a further complaint, committed the woman alone for trial by the Court of Session.

Held that the Magistrate had acted within his jurisdiction, section 142 of the Code of Criminal Procedure being designed to prevent a Magistrate from inquiring without complaint into a case connected with marriage, but, when a case is properly before the Magistrate, he may proceed against any person implicated.

THIS was a case called for by the High Court, as a Court of Revision, on perusal of the statements submitted by the Sessions Judge of Jessore at the close of the January Sessions.

The facts are sufficiently set forth in the judgment of the High Court (1), which was delivered by

JACKSON, J. :—

JACKSON, J.

Ujjala Bewa was put on her trial before the Court of Session upon a charge framed under section 494, Indian Penal Code.

The Sessions Judge stopped the case, being of opinion that the Magistrate's proceedings were illegal and the commitment invalid, inasmuch as, in his opinion, it did not appear that any complaint, in the proper sense of the term, was made by the prosecutor, Bheem Chumar, against Ujjala. It does not appear as a "complaint" in the proper sense of the term; but we find, on looking to the witness before the Magistrate, that Bheem, in the first instance, lodged a complaint against one Khettra or Bhitton, apparently of taking or keeping his wife away from him. Ujjala, being then in Court, said that she was not married to the com-

(1) JACKSON and CUNNINGHAM, JJ.

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 IN THE
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 BEWA.

plainant. Whereupon the Magistrate made this order: "I adjourn this case to the 26th instant, when, if the complainant elects to proceed, he is to appear with his witnesses," and he warns the complainant of the danger of urging a false complaint.

Judgment.

The complainant evidently did elect to proceed, for, on the 29th JACKSON, J. he was further examined, and then said (after again asserting his previous marriage to Ujjala), "I hear now that Ujjala has made nikah with Radin Chumar," and on the same date Ujjala was examined as a defendant. Evidence was gone into on that and following days, and on the 31st of July the complainant sought to give, and did afterwards offer, further evidence. The result was that, in the Magistrate's opinion, there was a good case against Ujjala, but not evidence to warrant the commitment of the man, whom she subsequently married, as an abettor.

The Sessions Judge refers to section 142, Code of Criminal Procedure, which forbids a Magistrate to take cognizance of a case without complaint, when the offence falls (as here) under Chapter XX., Indian Penal Code. That provision is clearly designed to prevent Magistrates from inquiring of their own motion into cases connected with marriage, unless the husband or other person authorized moves them to do so; but, apparently, when the case is once properly before the Magistrate, he may proceed against any person implicated. In the present instance, however, it is clear that the husband, or *soi-disant* husband, not only brought the case before the Magistrate, but, on its being set up that Ujjala had been married by nikah to another man, and after having an opportunity to consider, he chose to go on against her. The proceedings of the Magistrate, therefore, seem to have been in complete accordance with the law; we accordingly set aside the order of the Sessions Judge, and direct that the trial proceed.

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[EXTRAORDINARY CRIMINAL JURISDICTION.]

IN THE MATTER OF TILUCKDHAREE.

*Code of Criminal Procedure, section 263—Verdict of a Jury—Contrary
finding of High Court on the facts.*

1878
Mar. 22.

A majority of the jurors (four out of five) acquitted the prisoner on a charge of attempt to commit rape. The Sessions Judge disagreed with that verdict, and referred the case to the High Court under section 263 of the Code of Criminal Procedure, because, in his opinion, the offence charged was proved. The High Court found that the evidence for the prosecution was fully worthy of belief and consistent with probabilities, and sentenced the prisoner.

THIS is a case referred by the Sessions Judge of Patna to the High Court, under section 263 of the Code of Criminal Procedure, because he "disagreed with the verdict of the majority of the jurors" (four out of five), acquitting the prisoner on a charge of attempt to commit rape, and "considered it necessary for the ends of justice to do so."

The Sessions Judge in referring the case stated: "As I told the jury pretty plainly, I am of opinion that the offence charged is proved. There is nothing whatever to show that the case has been got up, and that the witnesses for the prosecution have spoken otherwise than truthfully. Neither is there any reasonable ground for the belief that the prosecutrix in any way connived in the attempt made on her chastity."

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IN THE
MATTER OF
TILUCK-
DHAREE

Judgment.

JACKSON, J.

The judgment of the High Court (1) was delivered by

JACKSON, J. :—

We consider the evidence for the prosecution in this case to be fully worthy of belief, and consistent with probabilities. The question raised by the accused is not whether the complainant was or was not a consenting party—an issue which it is often extremely difficult to decide—but whether the entire story for the prosecution is false, the defence being alike. We agree with the Subordinate Judge and one of the jurymen in thinking that there is no reason to discredit the case for the prosecution; we convict Tiluckdharee of an attempt at rape, and sentence him to undergo rigorous imprisonment for two years, and also to pay a fine of 200 rupees, in default of payment whereof, he is to undergo further rigorous imprisonment for one year.

(1) JACKSON and CUNNINGHAM, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF KUDRUTOOLLA AND OTHERS.

*Charge—Trial—Commitment—Code of Criminal Procedure, section 220
(explanation), section 221.*

A Magistrate is not limited to passing an order of acquittal or conviction after a charge has been drawn up. There is nothing in the explanation to section 220 of the Code of Criminal Procedure which prevents a Magistrate from committing the accused for trial by the Court of Session even after the charge has been drawn up and the witnesses for the defence have been examined.

"Trial," as defined in section 4, means the proceedings taken in Court after a charge has been drawn up, and section 220 empowers a Magistrate to convict at any stage in the proceedings in a trial.

THIS is a case referred by the Sessions Judge of Backergunge to the High Court, as a Court of Revision, that the order of the Magistrate committing Kudrutoolla and others for trial by the Court of Session might be set aside as contrary to law.

The accused were brought before the Magistrate on a charge of rioting (section 147, Indian Penal Code). The evidence for the

prosecution was recorded, a charge was drawn up, his defence was taken, and his witnesses were examined. The Magistrate then recorded what the Sessions Judge termed a judgment, but apparently not a judgment within the meaning of section 461 of the Code of Criminal Procedure, since he did not formally convict and sentence the accused. A few days later the Magistrate recorded an order that the charge was cancelled, and that the prisoners were committed for trial by the Court of Session.

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The Sessions Judge referred this case to the High Court as a Court of Revision, because he considered that, "having drawn up a charge, the Magistrate was bound to convict or acquit," and he relied on the terms of the explanation to section 220 of the Code of Criminal Procedure, stating his opinion also that, by the words "at any stage of the proceedings," in section 221, the Legislature meant before the charge was drawn up, so as to be consistent with the explanation to section 220.

The judgment of the High Court (1) was delivered by

CUNNINGHAM, J. :—

CUNNING-
HAM, J

"Trial," according to the definition in section 4 of the Criminal Procedure Code, means the proceedings taken in Court after a charge has been drawn up. It is clear, therefore, that section 221 of the Criminal Procedure Code, which follows section 220, authorizes a Magistrate, although a charge may have been drawn up, to stop further proceedings and commit for trial for this purpose section 221 may be regarded as a proviso to section 220. It may be added that, though the explanation to section 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew it. We see no reason, therefore, to quash the commitment.

(1) JACKSON and CUNNINGHAM, JJ

[CRIMINAL REVISIONAL JURISDICTION.]

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Mar. 27.

RAJCOOMAR SINGH AND ANOTHER PETITIONERS.

Section 530, Code of Criminal Procedure—Order of Civil Court—Section 141, Indian Penal Code—Illegal assembly—Refusal of Magistrate to summon witnesses for the defence—Section 359, Code of Criminal Procedure.

When the contending parties are admittedly in joint possession of certain premises, a Magistrate, under section 530, of the Code of Criminal Procedure, cannot determine whether one of them is at liberty to make use of the land in such a manner as to cause annoyance to another and against his will. Such a matter is beyond his jurisdiction.

Any order passed under section 530 ceases to have effect when the party aggrieved by it obtains an order from the Civil Court declaring his rights as against such order.

It is not intended by section 359 of the Code of Criminal Procedure that a Magistrate should enquire generally into the nature of the defence, and then to consider whether he should absolutely abstain from summoning the whole of the witnesses cited by the accused; but that, when the Magistrate considers that any particular witness is included for the purpose of vexation or delay, he should exercise his judgment, and enquire whether such witness is material.

The nature of the offences defined in sections 141 and 425, Indian Penal Code, discussed.

APPLICATION to the High Court, as a Court of Revision, to set aside as contrary to law the order of the Court of Session at Hooghly on appeal, enhancing the sentences passed by the Magistrate of the division of Serampore on conviction of the petitioners of causing mischief under section 427 of the Indian Penal Code.

The petitioners were convicted by the Magistrate of Serampore of rioting (section 147, Indian Penal Code), and were sentenced each to 'three months' rigorous imprisonment, being also required each to furnish recognizances of Rs. 100 to keep the peace for one year.

They obtained from the High Court (WHITE and McDONELL, JJ.) a rule to show cause why these sentences should not be set aside as contrary to law; but this rule was cancelled by AINSLIE and McDONELL, JJ. (see 1 C. L. R. 352), and the petitioners were

referred to the usual remedy by appeal. They accordingly appealed to the Sessions Judge of Hooghly, who, in dismissing their appeals, enhanced the sentences to six months' rigorous imprisonment. They now again moved the High Court as a Court of Revision to set aside the conviction and sentences.

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Branson and Jackson, for Petitioners.

J. D. Bell, for Opposite Party.

The following judgments were delivered by the High Court (1) :—

JACKSON, J. :—

JACKSON, J.

The conviction which led to the granting of this rule was first brought before a Division Bench of this Court on the 26th of October last, on which occasion the learned Judges who heard the application directed that the Complainant Dino Nauth Ghuttuck should be called upon to show cause why the sentence passed on the petitioners should not be set aside, and that in the meantime the petitioners be released on bail. The rule, which issued on the 26th of October, for some cause or other, did not come on for argument before the 18th of January. It was then observed that the petitioners had a right of appeal, and the Court, considering that the right which they had under the law should be first resorted to, discharged the rule, and observed that the Sessions Judge would exercise a wise discretion if, under the circumstances, he admitted the appeal, although the regular time had elapsed. On that an appeal was made to the Sessions Judge, and that officer, so far from affording any relief to the petitioners, dismissed their appeal, and doubled the punishment inflicted upon them by the Magistrate, and also directed that further proceedings be taken against the employers of the petitioners. On that a further application has been made to this Court, and we have now to consider the propriety of the original conviction, and also of the further order passed by the Court of Session. I think it necessary, in dealing with this case, to go a little further back, to show what the history of this matter has been; because it seems to me of some importance that the previous transactions and orders should be considered as enabling us to judge of the course taken by the parties and by the Magistrate.

(1) JACKSON and CUNNINGHAM, JJ.

[CRIMINAL.]

C. L. R., 23.

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SINGH.Judgment.

JACKSON, J.

The subject of dispute is the mode of enjoyment of a small piece of land which, as I learned from a small sketch which has just been handed to me, and of which the general correctness, I understand, is admitted by both parties, is situated to the south of the house of Shama Churn Lahory and close to it, but separated from the house by the Government road. This piece of land is situated at a distance of about two minutes' walk from the house of Gopee Kristo Gossain; and this Gopee Kristo is a joint owner to the extent of eight annas in the land, Shama Churn being co-owner to the extent of four annas and there is also a third owner who is not before us. It appears that some time before the Doorga Poojah, in 1876, Shama Churn desired to use this joint piece of land for the purpose of erecting upon it a platform supported by bamboos, which is called by the high-sounding name of *nobutkhana*: it was intended for musicians to sit upon, and the music to be performed there was probably connected with the approaching poojah. Some dispute having arisen in consequence of Gopee Kristo Gossain being unwilling that the land should be so occupied, the Magistrate of the sub-division held an inquiry, and made an order under section 530 of the Criminal Procedure Code, adjudging exclusive possession of that part of the land on which this *nobutkhana* stood to Shama Churn Lahory. In consequence of that, Gopee Kristo Gossain brought a suit in the Court of the Subordinate Judge, a suit of which the nature and result are not stated with sufficient accuracy by the Courts below. The object of it was to have it declared that Gopee Kristo Gossain was entitled to joint possession over the whole of this piece of land, and that Shama Churn Lahory was not entitled to erect a *nobutkhana* thereon, and it was specially prayed that this declaration should be granted, and that the *nobutkhana* should be broken down. The Subordinate Judge made a decree in all respects according to the prayer of the plaintiff, that is to say, his decree was that the plaintiff's suit be decreed. This decree, of course, ought to have been more carefully expressed, and the plaintiff by his pleader ought to have taken care that effectual relief was granted under it. All that was done for that purpose was that, a decree having been made on the 19th of May 1877, the Nazir proceeded to the spot, and, by planting a bamboo gate, what is

called symbolical possession. The *nobutkhana*, it appears, was not pulled down, but remained where it was. The very natural consequence was, that, on the approach of the Doorga Poojah of 1877, the dispute was renewed, and several servants of Gopee Kristo Gossain, acting doubtless under their master's instructions, went to the place, and pulled down this erection. On that Shama Churn Lahory complained, the servants were brought before the Magistrate, and convicted of the offence of mischief, and fined. That occurred on the 28th of September. On the morning of the 8th of October, the servants of Gopee Kristo Gossain, getting up early in the morning, found certain "ghuramies" in the employ of Shama Churn Lahory engaged in setting up this *nobutkhana* again. The men who made this discovery summoned others of their fellow-servants, and they, not only protested against the erection, but pulled down the bamboos, took them out of the ground, thrusting aside the servants of Shama Churn Lahory, and throwing to the ground another servant who had climbed upon one of the bamboos, and who had clung to it. Upon this a further complaint was made to the Joint-Magistrate of Serampore on the afternoon of the 9th of October. He immediately issued a summons, and had the accused brought before him. We gather from a part of the affidavit before us that the Magistrate in the first instance intended to deal with the matter summarily, but that on the application of the pleader for the accused, he agreed to take it up and deal with it in the usual form. At the same time he altered the charge against the accused to one of rioting, which of course, not being one of the offences specified in section 222 of the Code of Criminal Procedure, could not be dealt with in a summary form. One of the witnesses was examined before the charge was framed, and another afterwards. The defendants were called upon for their defence, and they named several witnesses. Now, it is stated, but the Magistrate denies the statement, and I very willingly accept his denial, that, in the first instance, he made a verbal refusal to summon these witnesses. However, summonses did issue on the following morning, but the witnesses were not to be found. On that, the accused applied to the Magistrate to grant further time for the appearance of the witnesses, representing that the time was a time of poojah

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when people were disinclined to attend the Court, and that they had not at a fair opportunity of procuring the attendance of their witnesses. The Magistrate, for reasons which he stated, declined to allow further time, and on the 12th of October proceeded to convict the prisoners of the offence of rioting under section 147 of the Indian Penal Code, and sentenced each to imprisonment for three months. The result of the appeal to the Court of Session, as I have already said, was that the Sessions Judge considered the sentence too lenient, and directed that the prisoners should each undergo rigorous imprisonment for six months.

It appears to me, in the first instance, that the Joint-Magistrate was in error in making any order in this matter under section 530 of the Criminal Procedure Code. It seems to me that the subject-matter was one to which that section could have no application. There was really no question of possession. The land was in the joint possession of the disputants, and the only question was whether one of them, being a joint owner, was at liberty to make use of the land in such a manner as to cause what the other joint owner chooses to consider an annoyance, and against the will of that joint owner. In fact the Magistrate himself, in a passage of his judgment, seems to furnish an excellent reason why he should not have exercised jurisdiction under that section. Adverting to an argument of the pleader for the accused as to the right of Gopee Kristo Gossain to forbid this mode of enjoyment, he says. "I am unable to accede to the application of this doctrine. The vakeel says that the doctrine would be monstrous, that a co-sharer might build a house upon land held in joint partnership, for his sole use," and so on. Then he goes on to say. "The objection does not apply here, for a *nobutkhana* is not a house; it is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth; it is an elevated platform on which musicians may sit. The grass can grow under it, and goats and cattle graze there." The Magistrate's own argument therefore was that Shama Churn Lahory, in erecting this *nobutkhana*, chooses to occupy the air; and, although section 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order under section 530 was beyond the power of the Magistrate, and ought not to have been made.

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The Magistrate, however, not only made that order, but has relied on it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest, from what afterwards took place, that the order had ceased to have any effect whatever, because the result of the order was that Gopee Kristo Gossain, being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the defendant had no right to erect a *nobutkhana* in that situation, and in fact decreed that it should be removed. But, as an order under section 530 is only valid until the person to whom possession is given is ousted by due course of law, and as the effect of that judgment of the Civil Court certainly was to oust Shama Churn Lahory, the order of the Magistrate ought not to have been referred to in any further proceedings. That order of the Civil Court, I understand, has not been set aside on appeal. It is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it was a valid decision of a competent Court, and the Magistrate as well as the parties were bound to respect it.

In respect of what occurred in September 1877, it appears to me that the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now, the definition of mischief is to be found in section 425 of the Indian Penal Code, which is this "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public, or to any person, causes the destruction of any property, or any such change in any property, or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits mischief." Now, as far as I can see, the only act done by the accused persons in that case was to change the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of a structure. Then, looking to the words "wrongful loss" as defined in section 23 of the Indian Penal Code, we have, "Wrongful loss is the loss by unlawful means of property to which the person losing is legally entitled." Now, it is clear from the decision of the Civil Court which was then in force that Shama Churn Lahory was not at that time legally entitled to have

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those bamboos put together in that place in the form of a *nobutkhana*, and consequently there was no causing of wrongful loss in the act done by the accused persons. It seems to me, therefore, that, if that conviction had been brought before this Court in the exercise of its powers of revision, the conviction would have been set aside, but the employer of the accused appears throughout these proceedings to have been singularly ill-advised. He had an illegal order made against him under section 530 untouched, which was allowed to remain untouched. He brings a suit in the Civil Court, of which he fails to obtain the full effect. His servants illegally suffer conviction for the offence of mischief, and that conviction is also allowed to pass unquestioned. He seems to have been then advised to cover this piece of ground with logs of wood and bricks and other materials, which was undoubtedly an unjustifiable act. His servants being then charged with rioting, it appears that their Counsel, instead of simply relying upon the decision of the Civil Court, thought fit, to argue before the Magistrate at length as to the question of right. Finally, upon the conviction taking place, instead of going at once to the Appellate Court, the accused were advised to come before this Court—a procedure which undoubtedly prejudiced them in the mind of the Sessions Judge, and which has added very much to the cost and anxieties of these proceedings.

I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now, first, as to the procedure. It appears to me that the accused were undoubtedly prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case to which the Magistrate refers. It seems to have been in the eyes of the Magistrate of particular importance that the employer of the accused persons should not gain his object, and from that it seems to result that he thought it was of great importance that the complainant should gain his object, that is to say, whatever the result of this prosecution might be, Shama Churn Lahory, the virtual complainant in the case, should be enabled to erect and keep erected this *nobutkhana* for such purposes as he thought desirable, and the Magistrate, in a passage of his explanation

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which was submitted to this Court some time ago, says that, on looking back to the proceedings, he is unable to see what other course he could have taken. I confess it does seem to me strange, considering that this question had been already submitted to a Civil Court which was competent to entertain it, and that that Court, whether rightly or wrongly, had determined that Shama Churn Lahory was not entitled to that particular form of enjoyment,—it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be to restrain Shama Churn Lahory from doing that which the Civil Court had decided he was not entitled to do until, at any rate, a further decision on the matter should have been obtained.

I have next to observe the refusal of the Magistrate to allow time to the accused for the appearance of their witnesses. The Magistrate (and I observe also the Sessions Judge) relies upon the alleged discretionary power of the Magistrate in this matter. Now, this being what is termed “a warrant-case,” the duty of the Magistrate in this particular is stated in section 219 of the Code. That section says: “The Magistrate shall, subject to the provisions of section 362, summon any witness, and examine any evidence, that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary.” Section 362 says: “In warrant-cases, the Magistrate shall ascertain, from the complainant or otherwise, the names of any person who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary. The Magistrate shall also, subject to the provisions of section 359, summon any witness, and examine any evidence, that may be offered on behalf of the accused person to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time.”

Section 359, to which reference is there made, says: “If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, he may require the accused person to satisfy him that there are

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reasonable grounds for believing that such witness is material." Now, I understand this section 259 to mean that, if, among the persons named by the accused as witnesses to a defence, the Magistrate considers any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment, and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate to inquire generally into what the defence of the accused person is to be, and to consider whether on hearing the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Setting that aside, can it be said here there was any purpose of vexation or delay for which these witnesses were summoned? The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious. The law enabled them to call witnesses in order to disprove or answer the case made against them, and considering what the time of the year was at which the first attempt to procure the attendance of these witnesses had been made, it does seem to me that it would have been reasonable to allow a further time for that purpose, and I moreover think it probable that, by reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question. It was one which depended somewhat on minute consideration. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining, first, whether the accused had committed any offence or not; and, secondly, what was the nature and extent of that offence. The Magistrate indeed says in order to justify his refusal, that the accused had confessed that with which they were charged. The accused confessed no such thing. They were charged with robbing. That which they had admitted was that they had pulled up these bamboos, and displaced the crection. That is a long way from confessing the offence of robbing.

Another point upon which I think we are bound to remark is, that the Magistrate, having at his command the means of obtaining evidence which was presumably impartial, that is to say, the evidence of his own police officers, did not either call or examine

any one of them. The witnesses for the prosecution were, believe, only two, and I should have expected in a case like this that the Magistrate should have resorted to the evidence of the police-officers, as presumably free from leaning or bias one side or the other. So far as to the procedure in this case.

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JACKSON, J.

I now turn to the conviction. The accused have been convicted of the offence described in section 141 of the Indian Penal Code. After a good deal of consideration, I am unable to satisfy myself that that which they did came under that section. Rioting, according to the Indian Penal Code, consists of force used in the prosecution of a common object, and by an unlawful assembly. We must, therefore, find that there was an unlawful assembly, that they had a common object, and that force was exercised in the prosecution of that object. Now, I think it highly probable that on this occasion there were five or more persons assembled. But who were these persons? They were not persons assembled together for any unlawful purpose, nor were they persons summoned together for the purpose of committing a breach of the peace. They were the ordinary servants, and probably, relatively speaking, only a few of the ordinary servants of this Baboo, Gopee Kristo Gossain. One of them discovers that stealthily the other party had, in the course of the night, put up this structure, which the Civil Court had declared he was not authorized to do, and he calls other servants to assist him in remonstrating and in removing this structure which was there erected illegally. It was suggested that this matter came either under the third or fourth clause of section 141. The third clause specifies the object to be that of committing any mischief or criminal trespass or other offence. In regard to mischief, as I have already said with reference to the previous conviction, it appears to me there was no mischief. In regard to criminal trespass, the allegation appears to me to be absurd. The accused persons were only where they were entitled to be—on their master's own land. They had not gone there, nor did they remain there, for the purpose of trespassing or for any other unlawful purpose. Then it is said that perhaps they had gone there for the purpose of enforcing some right or supposed right. It seems to me they had not gone there for any such purpose, but that the other side having gone there for

[CRIMINAL.]

C. L. R., 24.

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JACKSON, J.

the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess, these persons, merely representing their master, went there for the purpose of resisting that infraction of their master's right. It is admitted that no particular force or violence was used, and that this was the case might be further inferred from the fact that the police-officers who were on the spot saw no occasion to interfere. It appears to me, therefore, that there was no cause for convicting these persons of the offence of rioting, inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful purpose. I think, therefore, that the conviction, as well as the procedure under which the conviction was had, was illegal, and ought to be set aside.

I have only now to make one or two observations upon what has occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstance that he felt himself, whether rightly or wrongly, impressed with the duty of maintaining, not only the peace of the district, but also the authority of his own Court, and also by the fact that he had taken a large part in previous transactions, which led up to this conviction; and therefore that which he did, although it was, as I think, erroneous, was far from unnatural. But these considerations do not apply to the Court of Session. The Sessions Judge was an officer of infinitely more experience; he was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceedings, and yet he not only fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the line which the Magistrate adopted. The Joint-Magistrate has certainly shown that he was not slow to vindicate the respect due to his own Court, and he passed what he avowedly considers a severe sentence when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds or for what reasons the Sessions Judge, not merely affirmed, but doubled that punishment. I think, therefore, that this rule must be made absolute, and the conviction and the proceedings quashed. The proceedings taken by the Joint-Magistrate against Gopee Krieto Gossain and Nundo Lall Gossain must accordingly be stopped.

CUNNINGHAM, J. —

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HAM J.

I concur in setting aside this conviction. The facts in the case establish that certain co-owners were doing that, in the enjoyment of the common property, which, as between the parties, had been decided by a competent Court to be, and therefore must be regarded by us as being, illegal, viz, erecting a platform, the erecting of which the Court had forbidden. Thereupon the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abated the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was, on appeal, enhanced to six months.

It appears to me that the accused were merely exercising the remedy familiar to English Law, of abating a private nuisance. This right is thus described in Stephen's Commentaries, 5th Edition, Vol III, page 354. "Whatsoever unlawfully annoys or doth damage to another is a nuisance, and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commit no riot in the doing of it, nor occasion—in case of a private nuisance—any damage beyond what the removal of the inconvenience necessarily requires." The rule was laid down by Lord DENMAN in *Perry vs Fitzhew*, 8 Q.B. 775. In that case a commoner, whose right of common was interfered with by a building erected upon the common, came and pulled it down "about the plaintiff's ears," while he and his family were actually in it, and it was held that the serious risk of human life involved, and the consequent imminent danger to the peace, had, according to the analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

In the present case there appears practically to have been no violence, and no real danger of any breach of the peace,—indeed, the police were standing by and looking on while the abatement took place, and the act of abatement was therefore, in my opinion, legal.

The same view of the law appears to be reproduced in the Indian Penal Code. "Mischief" is defined in section 425, Indian

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HAM, J.

Penal Code, as the causing of any change in property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, with an intent to cause wrongful loss to any person, and Explanation II. shows that mischief may be committed by an act affecting property of which the person committing it is joint owner with others. Under this definition the act of the complainants in erecting the structure was, as I regard it, mischief.

Then, by section 99, Indian Penal Code, there is a right of private defence of property, moveable or immoveable, against an act which falls under the definition of "mischief." I do not think that the third exception in section 99 applies, as the accused had the right to prevent the structure being made, which they could not have done if they had waited to go to the Court for an injunction.

The observations of Chief Justice COUCH, in a similar case in 19 W. R., Cr., 66—*Birjoo Singh vs. Khub Lall*—seem applicable to the accused in this case.

Under this view, I think the accused were exercising a legal right of self-defence; consequently, that there was no criminal force, no unlawful assembly, and no riot; and that the conviction must be quashed.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF BHOOBUNESHWAR DUTT . PETITIONER.

1877
Dec 14.*Indian Penal Code, section 173—Refusal to give receipt for summons.*

The refusal to give a receipt for a summons is not an offence under section 173, Indian Penal Code.

Queen vs. Kolya bint Fakir, 5 Bom. 34, *Crown Cases*, followed.

THIS was an application to the High Court as a Court of Revision, to set aside the order of the Assistant Magistrate of Sewan, convicting the petitioner under section 173 of the Indian Penal Code, and, sentencing him to a fine of Rs. 30, or, in default of payment, to twenty-two days' simple imprisonment.

Baboo Amarendro Nath Chatterjea, for Petitioner.

The judgment of the Court (1) was delivered by

MARKBY, J. :—

It appears to us that this conviction must be set aside. The charge against the petitioner was that he had refused to give a receipt for a summons. This has been held by the High Court of Bombay (5 Bombay High Court Reports, page 34, *Crown Cases*) not to be an offence under section 173 of the Indian Penal Code, which is the section under which this conviction has been made. We concur in that decision.

This conviction will, therefore, be set aside, and the fine, if paid, will be refunded. If the petitioner is in jail, he will be released.

MARKBY and MITTER, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

April 28. SOFIRUDDEEN AND OTHERS APPELLANTS.

Confessions to Magistrate—Misconduct of police—Conviction solely on confessions to Magistrate.

Where the only evidence in a Sessions trial was confessions made to a Magistrate but subsequently retracted, and it was established that the police misconducted themselves in the search of the houses of the prisoners who confessed, and of others under trial, and produced evidence which was rejected as false, it was held that the prisoners could not safely be convicted on their own statements without any corroboration.

CRIMINAL APPEALS from the order of the Sessions Judge of Backergunge, convicting the appellants under section 395, Indian Penal Code, of dacoity, and sentencing them each to seven years' rigorous imprisonment.

The appellants, with others, were tried on a charge of dacoity by the Sessions Judge of Backergunge, by whom, in concurrence with the opinion of the Assessors, they were convicted. Several others were acquitted in the Sessions trial, and the Sessions Judge agreed with the Assessors in rejecting as untrustworthy a mass of evidence relating to the finding of various articles said to be part of the stolen property in the house of the accused. The conduct of the police was unfavourably commented on, both as regards the house-searches and the preparation of the list of the stolen property said to have been furnished by the complainant. The appellants, however, were convicted on their confessions to the Magistrate, which were uncorroborated by any reliable evidence in the case, those who had not confessed being acquitted.

Baboo Doorga Mohun Dass for the Appellants.

The judgment of the High Court (1) was delivered by

MARKBY, J.:-

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SOFI-
RUDEEN.

In this case the conviction of the three prisoners rests wholly upon their confessions to the Magistrate. Now, the Sessions Judge and the Assessors, although they thought fit to act upon those confessions, have come to the conclusion that the police officers were guilty of misconduct in having produced evidence with regard to the identification of the property which was false. That misconduct being established against the police, we think that it is not safe to act upon the confessions without any corroboration at all.

Judgment.
MARKBY, J.

Those confessions were made on the 1st of November 1877, but they were retracted before the case left the Magistrate's Court, and when the prisoners were about to be committed to the Sessions, all these three prisoners asserted their innocence. When the houses of the three prisoners were first searched nothing was found. On a subsequent occasion the prisoners' wives are said to have produced certain property, but even the property so produced did not tally with that which the prisoners confessed to having taken.

Under these circumstances, there being absolutely no corroboration whatever of those confessions, and there being admitted misconduct on the part of the police, we think that we ought not to act upon the confessions alone, and that the conviction cannot be supported. The result is that the conviction and sentence must be set aside, and the prisoners released.

(1) MARKBY and PRINSEP, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

April 16. IN THE MATTER OF GANGADHUR BHONYA AND OTHERS.
(CONVICTS).

Act XVIII. of 1869 (Stamp Act), section 43—Trial by the officer authorized to institute and conduct the prosecution.

Where an officer has been authorized by the Collector under section 43, Act XVIII. of 1869, to institute and conduct the prosecution in certain cases, he is not competent also to try them.

Queen vs. Nuddya Chand Poddar, 24 W. R., Cr., 1, followed.

CASE referred by the Sessions Judge of Midnapore that certain sentences of fine passed by the Magistrate of the Division of Contai, under section 29, Act XVIII. of 1869, might be set aside as contrary to law.

It appears that, on enquiries made, certain breaches of the stamp laws by private traders were brought to light. The Collector of Midnapore, under section 43 of the Stamp Act (XVIII. of 1869), authorized the officer in charge of the Division of Contai to institute and conduct the prosecution in these cases, and that officer, as Magistrate, tried and convicted the accused, sentencing them to fine under section 29 of that Act.

These orders were referred to the High Court as a Court of Revision, by the Sessions Judge of Midnapore, who considered that the proceedings held by the Magistrate were contrary to law. The Sessions Judge cited *Queen vs. Nuddya Chand Poddar*, 24 W. R. 1, Cr. R. 1878
GANGADHUR
BHONYA.
Judgment.

The judgment of the High Court (1) on the reference submitted is as follows:—

These cases have been submitted to us by the Sessions Judge of Midnapore, because sentences of fine have been imposed by the Magistrate of the Division of Contai for breaches of the Stamp Law, contrary to the rule laid down in the case reported in 24 W. R. 1. It appears that the Collector authorized this officer under section 43 of the Stamp Act to "institute and conduct the prosecution" in these cases. Under these circumstances, we think that he was not competent also to try them. Any possible inconvenience might have been obviated by the Collector employing the Government Pleader or some other person to conduct the prosecution under section 43. We quash the convictions and sentences, and direct that the fines, if paid, be refunded.

(1) MARKBY and PRINSEP, 77.

[CRIMINAL APPELLATE JURISDICTION.]

1878
April 18.

JADDOONATH DUTT APPELLANT.

Section 191, Indian Penal Code—False evidence—Witness criminating himself—Evidence Act, I. of 1872, sec. 134.

Although a person under examination as a witness is bound by his affirmation to tell the truth, if he is examined on a point on which he is likely to criminate himself, his position should be explained to him by the Magistrate, as otherwise he may be induced, through ignorance of the state of the law, to deny the existence of facts for fear of penal consequences. Although without such a warning he may make a false denial, and thereby become guilty of the offence of intentionally giving false evidence, his offence will not be deserving of severe punishment.

CRIMINAL APPEAL from the orders of the Sessions Judge of Midnapore, convicting the appellant of intentionally giving false evidence in a judicial proceeding (section 193, Indian Penal Code), and of abetting a public servant to receive an illegal gratification, such offence not being committed in consequence of that abetment (sections 116 and 161), and sentencing him separately for each offence.

One Brojo Mohun Dutt, the Naib of a Zemindar, was under trial before the Magistrate of Contai on a charge of causing wrongful confinement. While that case was under trial, the Police Inspector of Tumlook reported to the Police Inspector of Contai that he had learnt that, for some reason unknown to him, an attempt was being made by Jaddoonath Dutt to induce the medical officer, by means of a bribe, to certify that, on a certain day, Brojo Mohun Dutt was under his medical treatment. In due course this was made known to the Magistrate, who directed the attendance of Jaddoonath Dutt, and examined him as a witness in the trial of Brojo Mohun Dutt, when he denied the act imputed to him by the police of attempting to procure a false *alibi* by bribing the medical officer. Proceedings were then taken against Jaddoonath Dutt, which resulted in his being convicted and sentenced in the Sessions Court as already stated.

Mr. R. E. Twidale, for the Appellant.

The judgment of the High Court (1) was delivered by

MARKBY, J. :—

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JADDOONATH
DUTT.

Judgment.

MARKBY, J.

With regard to the false evidence, although we cannot go so far as to say that the Magistrate who sent for the prisoner, and put the questions to him, had no authority to do so, it was surely the duty of the Magistrate, if he intended to examine the prisoner as a witness in the other case, to explain his position to him, and to inform him of the protection which the law gives him, viz., that he himself would not suffer any consequences if he told the truth. Unless the Magistrate did that, the prisoner might reasonably presume that he was in reality undergoing some proceedings against himself, which might lead to his being convicted of an offence. Therefore, without saying absolutely that no offence was committed, we have no hesitation in saying that the sentence passed was very much too severe.

But this in no way affects the charge upon which the prisoner has been convicted under sections 116 and 161; and, considering that the sentence of six months' rigorous imprisonment and fine of one hundred rupees which has been passed for this offence is the maximum punishment which the law has assigned for it, we think that, if we allow that sentence to stand, and pass no sentence upon the other charge, the prisoner will be sufficiently punished for the substantial offence which he has committed.

(1) MARKBY and PRINSEP, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

1878
March 28.
April 1.

BEJADHUR RAI APPELLANT.

Murder—Culpable homicide—Presumption from probable consequences of an act.

The appellant, having armed himself with a sword, struck in the dark at certain persons in a house, causing wounds which resulted in the death of one person.

Held: per JACKSON, J.—That such conduct raises an inference that he intended to cause death.

Per AINSLIE, J.—That though he probably did not see how his blows were directed, as he struck them with a deadly weapon regardless of consequences, he must have known that his act was so imminently dangerous that it must, in all probability, cause such bodily injury as was likely to cause death.

Per CUNNINGHAM, J.—That the offence was culpable homicide, and not murder, being an unpremeditated act of reckless violence rather than an act done with the knowledge or intention which is essential to constitute murder.

CRIMINAL APPEAL from an order passed by the Sessions Judge of Sarun, convicting the appellant under section 302 of the Indian Penal Code, and sentencing him to transportation for life.

The appeal was heard by JACKSON and CUNNINGHAM, JJ, and, as they differed, it was heard by AINSLIE, J., as a third Judge.

The facts will sufficiently appear from the following judgments, which were delivered by the High Court (1):—

March 28. JACKSON, J.:—

JACKSON, J. In my opinion the conviction was right.

The accused Bejadhur was angry with Ram Soondur, now deceased, because the latter had pulled up a stake planted by Ram Bhunjūn, nephew of the accused, for the purpose of hindering the ingress and egress of a woman kept by one Abhiak. The accused followed Ram Soondur to the house of his father, the witness Ajhas. They abused each other; Bejadhur then was

(1) JACKSON, AINSLIE, and CUNNINGHAM, JJ.

about to strike Ram Soondur with a *lati*, on which Ajhas wrested it from him, and threw it away. Bejadhur then went back to his house, and fetched a sword, and attacked the father and the son, who seem to have been unarmed. It was "two pruhurs of night," that is, after dark. Bejadhur first wounded the father Ajhas, inflicting a cut on the left fore-arm, described by the Assistant Surgeon as a big incised wound extending obliquely, dividing the bones and soft structures. Ajhas dropped, and Bejadhur then cut at Ram Soondur, inflicting a wound which all but severed the thumb and forefinger from his left hand, also a slight incised wound on left fore-arm, and a similar one on the inner side of the right arm; all of which the Assistant Surgeon considered to have been sword-cuts. Ram Soondur died in the course of the night from loss of blood and shock to the system. Ajhas, after he had recovered consciousness, was taken to hospital, where he remained 2½ months.

In such circumstances I should have no difficulty in finding, first, that the accused had caused the death of Ram Soondur by an act done with the intention of causing such bodily injury as he knew was likely to cause death; or, second, that he cut at the two men in the dark, well knowing that to do so was so imminently dangerous that he would in all probability cause the death of one or both of them, and in fact thereby causing the death of one. Indeed, it would not be too harsh an inference where a man armed with a sword attacks first one and then another unarmed man, and wounds them both in the manner described, that he intended to cause death. That the blows fell on parts where a wound is not necessarily fatal is an accident probably due to their having raised their hands or arms to protect a vital part—the head.

Assessors frequently shrink from the responsibility of a judgment which may entail a capital sentence, and for this reason I attach little weight to their opinion in the present case. As my brother Cunningham is of a different opinion, the case must be laid before the third Judge.

CUNNINGHAM, J. :—

I think that the assessors were right in acquitting this prisoner

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BEJADHUR
RAI,
Appellant.

Judgment.

JACKSON, J.

CUNNING-
HAM, J.

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RAI,
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HAM, J.

under section 302, and convicting under sections 304 and 326, Indian Penal Code, inasmuch as the facts of the case do not seem to me to necessitate the inference that the act which caused death was done with the intention of causing either death or such bodily injury as the offender knew, to be likely to cause death, or bodily injury sufficient in the ordinary course of nature to cause death, or with the knowledge described in paragraph 4 of section 300. The evidence to my mind establishes culpable homicide, such as is provided for in the last clause of section 304, where there is a knowledge that the act is likely to cause death, but no intention to cause death or a fatal wound: the prisoner in fact, I think, struck without regard to consequences.

The quarrel arose one night about a woman kept by one Abhiak Nambhunjan; the prisoner's nephew objected to her, and put a post in front of her door to annoy her. Ram Soondur, coming along and being complained to by the woman, pulled up the post. Then the prisoner and Nambhunjan came to Ajhas Rai's house, using abusive language. The prisoner tried to strike Ram Soondur with a *lattie*, but the *lattie* was seized by Ajhas Rai and thrown away. Then the prisoner went to his house, got a sword, and inflicted the wound for which he has been convicted of murder. He first inflicted a wound on Ajhas Rai which did not result in death; he then struck Ram Soondur on the hand, the wound was 4 inches long, and apparently nearly severed the thumb and forefinger from the hand. There was another wound skin-deep, on the left arm and another on the right.

The scuffle took place in the dark; the bystanders wrested the sword from the prisoner, who then ran off. The surgeon inferred that shock and profuse hæmorrhage from the wound might have contributed to the death of the deceased.

The facts seem to me to point rather to an unpremeditated act of reckless violence than to the sort of knowledge or intention which is essential to murder. It is not proved to my mind that the prisoner intended to inflict a wound that could endanger life, nor was the Surgeon asked whether it was in the ordinary course of nature that such a wound should cause death. I think it doubtful whether it was, and at any rate the prisoner may

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not have known it to be so. And I think, therefore, that sections 304 and 326 more properly meet the case than the section under which the prisoner has been convicted.

AINSLIE, J. :—

April 1.
AINSLIE, J.

I concur with Mr. Justice JACKSON in thinking that the prisoner was rightly convicted of murder. In the course of an altercation with Ram Soondur, he attempted to strike him with a *lattie*, but this was wrested from him by Ajha and thrown away. He then went into the house, armed himself with a sword, and returning attacked both of them; it was nearly dark at the time, and probably he did not see very clearly how his blows were directed; but it seems to me impossible to doubt that he struck them with a deadly weapon, regardless of the consequences, and that he must at least be taken to have committed the offence with the knowledge that his act was so imminently dangerous that it must in all probability cause such bodily injury as was likely to cause death. There is no one of the exceptions to section 300 which applies to the case. I do not see that we can presume, in favour of a man who, giving way to passion, commits, though without premeditation, an act of reckless violence with a deadly weapon, that he had no intention to cause such bodily injury as is likely to cause death; he clearly intends the probable consequences of his act, and a very probable consequence is the causing of death.

The fact that he was deprived of self-control by provocation does not help him unless the provocation be grave and sudden, and such as to bring the case within the exception. In this case it clearly was not so.

If we are to hold a man bound to use his reason before he uses his hands, we cannot excuse him on the ground that he allowed his reason to be overpowered by passion, unless there are sufficient excuses for the overwhelming passion. I would, therefore, uphold the conviction.

[CRIMINAL APPELLATE JURISDICTION.]

1878
April 15.

BOODHOO JOLAHA APPELLANT.

Sentence of death—Probable accident in execution—Sentence commuted.

Where the condition of the convict rendered it likely that, if he were hanged, decapitation would ensue, the sentence of death was commuted to one of transportation for life.

CASE referred to the High Court, under section 28f of the Code of Criminal Procedure by the Sessions Judge, of Gya, for confirmation of the sentence of death passed on the prisoner on his conviction of murder under section 302 of the Indian Penal Code. The convict also appealed under section 271 of the Code of Criminal Procedure.

It appears that, after committing the murder charged, the prisoner attempted to commit suicide by cutting his own throat.

In referring this case the Sessions Judge remarked: "I think it right to draw the attention of the High Court to the fact that the convict has received severe injury to the throat, and I forward herewith a letter from the Civil Surgeon in reply to the inquiry made by me regarding the effect of such injury if a capital sentence be inflicted on the convict."

The Civil Surgeon's report was to the following effect: "I have examined the prisoner Boodhoo Jolaha, and beg to state, for your information, that in the neck of the prisoner there is an aperture communicating with the larynx through which air passes, and by means of which he could breathe even if the neck were compressed above it. I am of opinion, however, that the sentence of the law for capital punishment, if passed, can be carried out by allowing a very deep drop, so that dislocation of the neck may be the immediate result. But I beg most emphatically to point out that I cannot state positively that no untoward or distressing accident, such as the re-opening of the wound or the complete severance of the head, can take place."

The following judgment was passed by the High Court (1):—

We dismiss the appeal, but under the circumstances of the

case, having regard to the report of the Civil Surgeon of the 21st March last as to the condition of the prisoner, we feel compelled to abstain from confirming the sentence of death passed upon him and we order that, instead of suffering that sentence, he be transported for life.

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BOODHOO
JOLAH, ^{Appellant.}
—

[CRIMINAL REVISIONAL JURISDICTION.]

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April 30.

IN THE MATTER OF SUFFURUDEEN 1ST PARTY;

AND

IBRAHIM

2ND PARTY.

*Section 50, Code of Criminal Procedure—Trial by Bench of Magistrates—
Jurisdiction—Section 530.*

Applying the definition of "trial" to section 50, Code of Criminal Procedure, under which a Bench may be empowered "to try such cases or such classes of cases, only and within such limits as the Government may direct," a Bench is competent only to hold trials for offences and cannot deal with miscellaneous matters such as those under section 530.

CASE referred by the Sessions Judge of Backergunge to the High Court, as a Court of Revision, that an order of a Bench of Magistrates under section 530, Code of Criminal Procedure, directing a certain party to be retained in possession of certain land be set aside as contrary to law.

The following order was passed by the High Court (1):—

We are of opinion that it was not competent to a Bench of Magistrates to deal with a case under section 530. A Bench may be empowered under section 50 "to try such cases or such classes of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers only to trials for offences, and not to miscellaneous matters, such as those coming within section 530. So that in this view of the law also the order passed was illegal. It is accordingly set aside.

(1) MARKBY and PRINSEP, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF SREEMUTTY RANEE }
 ANONDOMOYEE DEBEE } 1ST PARTY;

1878
April 30.

AND

LUCHMUN PERSHAD GOGO AND OTHERS . 2ND PARTY.

Section 530, Code of Criminal Procedure—Death of one of the parties.

On the death of one of the persons concerned in a matter under section 530, Code of Criminal Procedure, just before those proceedings terminated in favour of that person and another, though it would be more regular for the Magistrate to postpone the proceedings and make his representative a party in his place, the proceedings are not necessarily bad since the death has prejudiced no one.

CASE referred by the Sessions Judge of Midnapore, that the orders of the Magistrate in a proceeding under section 530 of the Code of Criminal Procedure might be set aside as contrary to law by the High Court as a Court of Revision.

The Sessions Judge, in submitting the case, made the following remarks:—

"The case is one under section 530, Code of Criminal Procedure, concerning possession of a ferry; and the Deputy Magistrate of Tumlook decided in favour of the second party on February 12th, 1878, Luchmun Pershad Gogo having died on the 7th idem. I think that the Deputy Magistrate's order is liable to be set aside, because he knew one of the parties was then dead."

The following order was delivered by the High Court (1):—

We see no reason for setting aside the Magistrate's order under section 530, because one of the two parties, in whose favour the order was passed, died just before the proceedings terminated, for we observe that there was another in whose favour that order still remains, and though probably it would have been more regular had the Magistrate postponed the case so as to enable some representative of the deceased to appear, the death could have prejudiced no one since the order was in favour of the deceased and another person.

[EXTRAORDINARY CRIMINAL JURISDICTION.]

April 18. IN THE MATTER OF THE EMPRESS OF INDIA. *vs.* SAHAIRAI.

Section 263, Code of Criminal Procedure—Verdict of jury disapproved by Sessions Judge—Voluntarily causing hurt—Section 321, Indian Penal Code—Hurt intended for one person and carried to another.

When a man strikes a woman with a child in her arms on that part of her person which is close to the head of the child, it must be presumed that he knew that he was likely to strike the child and endanger its life. Such an act amounts to voluntarily causing grievous hurt to the child, though it may not have been the intention of the person to strike the child.

When a Sessions Judge submits a case under section 263 of the Code of Criminal Procedure to the High Court, because he disagrees with the verdict of the jury, acquitting the prisoner, he is bound to state the exact offence of which, in his opinion, the prisoner should have been convicted.

CASE submitted by the Sessions Judge of Patna under section 263, Code of Criminal Procedure, because he disagreed with the verdict of a majority of the jury (three out of five) acquitting

the accused. The facts sufficiently appear in the letter of the Sessions Judge and the judgment of the High Court.

The Sessions Judge submitted this case with the following remarks:—

"The main charge against the prisoner was that, whilst he was beating a woman labourer by name Chetya with a heavy leather shoe, two of the blows alighted on the head of her baby, which she had at her breast. Its skull was broken, and it died then and there. I told the jury pretty plainly that, in my opinion, the offence charged was proved, and there was no reason to suppose that the case had been got up. Although the witnesses, mostly women, and of a very low and ignorant class, had not spoken the truth on some points, there was no ground whatever for disbelieving them as to the main facts. I also told the jury that it was alleged that the child was killed whilst in the arm of Chetya; they ought, if they believed the evidence for the prosecution, to convict the prisoner of having assaulted Chetya as well as the baby, or acquit him of both assaults. It seemed clear that the story for the prosecution should be accepted or rejected as a whole. The jury, after having retired for half an hour, delivered, through their foreman, an unanimous and clear verdict to the effect that Chetya had been assaulted by the prisoner, but said nothing about the baby; and the foreman seemed unable to tell me what was the opinion of the jury respecting it. I therefore directed them to retire, and let me know what they had to say about the assault on the child. After an absence of fifteen minutes the jury returned, and the foreman announced that three of the jury did not believe that the child had been killed by the prisoner, and that two thought that the prisoner had killed the child, and was guilty, of culpable homicide. I am at a loss to understand how the three jurymen, after having found that Chetya had been assaulted by prisoner, could have held, as they have, that the child was not killed by the prisoner. Even the defence admits that the child was in the mother's lap just before it died, and it seems obvious that the whole story for the prosecution is true. I am inclined to think that the three jurymen have been influenced by the ungrounded fear that, if prisoner were found guilty by them of killing the child, the

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sentence imposed on him would necessarily be a very severe one."

Baboo *Jugdanund Mookerjee* (Junior Government Pleader), for the Prosecution.

Mr. *R. E. Twidale* and Mr. *Sandel*, for the Prisoner.

The following judgment of the High Court (1) was delivered by

MARKBY, J. MARKBY, J.

The facts of this case do not appear to be susceptible of any doubt. The prisoner was employer of a man named Behari, his wife Chetya, and his sister Foolcoomaree. Some disagreement appears to have arisen as to the payment of the wages due to this family. In the morning in question, the prisoner went to the house of Behari, and called Chetya, the wife of Behari, and Foolcoomaree, his sister, to execute some work on his behalf. They refused, and made use of language which, no doubt, was disrespectful. Thereupon the prisoner, with the shoes he was wearing, commenced striking Chetya about the head and shoulders. Chetya had at that time a child of a few months old in her arms, the head of the child, as she describes it, being either upon or close to her shoulder. One of the blows delivered by the prisoner fell upon the child's head, and, as was almost certain to happen, the child died in consequence.

The prisoner was charged with culpable homicide not amounting to murder of the child, of causing the death of the child by a rash and negligent act, of grievous hurt to the child, and of hurt to the child, the last two charges being added by the Sessions Judge. There was no charge made with reference to the assault upon the mother.

The result of the trial was, that three of the jury thought that the prisoner should be acquitted altogether. The other two jurors seem to have thought that the accused was guilty of culpable homicide of the child.

The Judge has told us that he differs from the verdict of the majority, who have acquitted the prisoner altogether; but we

feel someembarrwasht rasssed in the matter by this—that he has not told us of what crime, in his opinion, the prisoner was guilty. Reading sections 263 and 464 of the Criminal Procedure Code together, we think that it is the duty of the Judge, in cases like this, to give us his own opinion, if he disagrees with the verdict of acquittal, as to the exact offence of which he considered the prisoner is guilty. We think that this Court has a right to expect from the Sessions Judge his opinion in a case of this kind. Nevertheless, we think we are still competent to deal with the matter, and the Government Pleader, who has appeared before us, has very properly not pressed for a conviction of culpable homicide. We are extremely doubtful whether technically the charge of culpable homicide could be supported; but we think we are justified, upon the facts proved, in finding the prisoner guilty of grievous hurt under section 322. There being no doubt whatever as to the facts of the case, we have no hesitation in finding the prisoner guilty under that section, notwithstanding that he was acquitted altogether by three of the jury, probably because they did not fully understand the law upon the subject. No doubt, what the prisoner intended was to inflict some injury upon the mother, and in one sense he did not intend to inflict any injury upon the child at all; but it seems to me that the language of section 321 covers a case in which a man intending to aim a blow at one person strikes another. That section says: "Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said voluntarily to cause hurt to such person." The very general language of that section was, I think, used expressly for the purpose of covering a case of this kind. I also think that the prisoner is also liable for causing grievous hurt. Section 322 provides that "whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said voluntarily to cause grievous hurt." I think that it is impossible to say, when a man strikes a woman with a child in her arms, and strikes her on that part of her person which

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is close to the head of the child, that he does not know that he is likely to cause grievous hurt to the child. He must, as a reasonable being, know that nothing is more probable than that the blow which he aims at the woman would fall on the child, and that any blow which would fall upon the child's head would be likely to cause such hurt as would endanger the child's life. This is one of the definitions of grievous hurt, and therefore, in my opinion, the prisoner ought to be convicted under section 322

Of course, the most important matter in this case is, what is the punishment which the prisoner ought to undergo. The evidence certainly shows that the prisoner's conduct was very violent. There was nothing which could justify his conduct even as regards the mother; and to strike a woman, with a child of tender age in her arms, is certainly a most unjustifiable act. No doubt, the prisoner never desired to do any injury to the child, but still he has done an act which deserves severe punishment. Under section 325 of the Indian Penal Code, he will be sentenced to rigorous imprisonment for two years.

[CRIMINAL REFERENCE.]

IN THE MATTER OF CHOOHAI TELEE . . PETITIONER.

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April 8.*False charge—Preliminary inquiry—Section 211, Indian Penal Code—Section 471, Code of Criminal Procedure.*

A petition was presented to the Joint Magistrate charging the police with having made a false report of an investigation which they had been directed to make at the instance of the petitioner. The Joint Magistrate, after reading the police report, rejected the petition, and directed the petitioner to be prosecuted under section 211 of the Indian Penal Code for having made a false charge: *Held* that the joint Magistrate should not have made the order without first instituting an inquiry into the truth of the complaint, such as is required by section 471 of the Code of Criminal Procedure.

Queen vs. Gaur Mohun Singh (16 W. R. 44) and *In the Matter of Sayud Nissar Hossein* (25 W. R. 10) considered.

THIS was a reference from the Sessions Judge of Tirhoot, the terms of which are as follow:—

“One Choolhaie Teelee, on the 4th of December 1877, lodged a complaint in the Foujdari Court, that his dhan crop had been looted by Brijbeharee Singh and others, and praying that the case might be enquired into, and the accused punished. The Deputy Magistrate, Rai Ishree Pershad, Bahadpoor, by whom the petition of complaint was received, examined the complainant, and then referred the matter to the police for investigation. Eventually the police reported that the charge was false, on which complainant put in a petition accusing the police of having made a one-sided enquiry, and praying that the witnesses named in his petition of complaint might be summoned, and his case proceeded with. The Joint Magistrate of Mozufferpore, however, on the 4th of January 1878, after perusal of the police report, refused to accede to complainant's request, and ordered him to be prosecuted under section 211, Indian Penal Code, the police being directed to send in the necessary proof. On the 21st of January, the prosecutor and witnesses appeared, and the Joint Magistrate made over the case to the Deputy Magistrate

[CRIMINAL.]

C. L. R., 27.

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CHOOHHAIR
TELEE,
Petitioner.

Statement.

aforenoted for trial under section 211, Indian Penal Code. Previous, however, to any decision being arrived at, Choolhaire Telee petitioned this Court, that all the records might be sent for, and a report submitted to the High Court, with a view to the Joint Magistrate's order of the 4th of January being quashed, on the ground of irregularity and illegality. I am of opinion that the Joint Magistrate acted *ultra vires* in summarily rejecting complainant's petition asking to have his witnesses examined, and that he (the Joint Magistrate) ought to have complied with the prayer contained in the said petition, and made further inquiry to satisfy himself that the proceedings of the police were not, as stated by complainant, partial and improper, before charging him under section 211, Indian Penal Code. (See *Queen vs Gour Mohun Singh*, 16 W. R., Cr., 44; *Sayud Nissar Hossein*, Petitioner, 25 W. R., Cr., 10.)"

Judgment.

The following judgment was delivered by the High Court (1) :—

The Deputy Magistrate, after examining the complainant, and having reason to distrust the truth of the complaint, ordered an inquiry by the police before issuing any process. The police report was that the complaint was false, and the Deputy Magistrate then dismissed the complaint. The complainant then made a petition to the Joint Magistrate of Mozufferpore, accusing the police of misbehaviour, and asking to have his case tried. The Joint Magistrate, after reading the police report, rejected the petition, and directed the complainant to be prosecuted under section 211 of the Indian Penal Code for having made a false complaint. The complainant then petitioned the Sessions' Judge, who has submitted the case for our orders, as, in his opinion, the order of the Deputy Magistrate dismissing the complaint was contrary to law, which would consequently vitiate the other proceedings ordered by the Joint Magistrate.

We observe, first, that the Deputy Magistrate, Rai Ishree Pershad, is a Magistrate of the first class, and therefore the order passed by him under section 147 of the Code of Criminal Procedure, dismissing the complaint, would, under section 298, be subject to the orders of the Sessions Judge.

We find nothing contrary to law in the Deputy Magistrate's

order, which is one in accordance with sections 146, 147, of the Code of Criminal Procedure. The decision in 16 W. R. 44, *Queen vs. Gour Mohun Sing*, quoted by the Subordinate Judge, is not against this view of the law; and the report of the case in 25 W. R. 10, *Sayad Nissar Hossein*, does not give the facts sufficiently for us to determine how far that case is in point.

1878
CHOOHAIK
TELEE,
Petitioner.
—
Judgment.

The Joint Magistrate's order is, however, open to objection. It is not clear what authority he had to pass it, for the Deputy Magistrate apparently is not a Court subordinate to him within the terms of section 468; but, however that may be, it does not appear that he made any preliminary inquiry, such as is required by section 471, and such as in the present instance would be most desirable to substantiate the correctness of the police report.

We, therefore, direct that all further proceedings on the Joint Magistrate's order of the 4th of January 1878 be stayed.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CHUMMUN SHAHA (CONVICT).

April 30.

Sections 224 and 346, Code of Criminal Procedure—Admission of accused—Conviction—Examination irregularly recorded.

A Magistrate is competent, under section 224, Code of Criminal Procedure, to convict an accused person on his admission of his commission of the imputed offence. The legality of a conviction so obtained does not depend on the regularity of the record of any examination afterwards taken.

CASE referred by the Sessions Judge of Bhaugulpore to the High Court, as a Court of Revision, that the order of the Magistrate convicting Chummun Shaha might be set aside as contrary to law.

The facts of this case appear sufficiently from the letter of the Sessions Judge, which was to the following effect:—

— The only evidence, if I may so call it, recorded against Chummun Shaha is what purports to be a confession before the Deputy Magistrate. This document does not bear the certificate required by section 346, nor the signature or attestation of the accused. The Deputy Magistrate has not even examined the complainant in the case.

1878

CHUMMUN
SHAHA,
Convict.

Judgment.

"Section 216, Code of Criminal Procedure, Explanation III, directs that in the trial of warrant cases by the Magistrate 'the charge shall be prepared as soon as the Magistrate is of opinion that a *prima-facie* case has been established against the accused person, although the whole of the evidence for the prosecution may not have been completed.' Section 324 of the same Code provides that, 'if an accused person admits the commission of an offence before a Court competent to try him for such offence, such Court may convict him on his own admission.' I doubt very much whether the Legislature meant to give Magistrates the power of framing a charge merely on the admission of a prisoner where a *prima-facie* case has not been otherwise made out; but in this particular instance, as the prisoner's confession is attested neither by the certificate required by the law, nor by the prisoner's own signature, I think that the trial has been illegally conducted, and that a new trial should be ordered. This I have no authority to order, as Chummun Shaha has not appealed.

"Bechu Singh was tried at the same time with Chummun Shaha. His confession is also unsigned, but it bears the certificate required by the law. Bechu Singh appealed, not on the ground of the irregularity of the proceedings, but on the representation that the sentence was excessive. The papers are annexed in order that the whole case may be before the Court.

The following judgment was delivered by the High Court (1):—

It was unnecessary for the Magistrate to record any confession of Chummun Shaha; he was competent, on the admission of Chummun Shaha, to sentence him without any further record (section 324, Code of Criminal Procedure). Section 346, on which the Sessions Judge relies, refers to an examination made on a trial, so that any irregularity in the mode of record could not affect the propriety of this conviction.

"As regards the other convict we express no opinion. The Sessions Judge should deal with his case, which is now on appeal before him; but we would observe that he should not allow irregularities which can be remedied to interfere with the course of justice.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF BARODA PROSUNNO CHUCKERBUTTY
AND OTHERS.

1878
May 6.

Trial by Bench of Magistrates—Powers of Bench—Absence of members at adjourned trial.

A case triable only by a Magistrate exercising powers of the 1st class came before a Bench of Magistrates, neither of whom individually exercised those powers, but sitting together the Bench was so invested. At the adjourned trial only one of these Magistrates was present. *Held* that he was not competent to try the case alone and the orders passed by him were set aside as illegal.

THIS was a case referred to the High Court as a Court of Revision to set aside an illegal order passed by a Bench of Magistrates.

The facts sufficiently appear from the judgment of the High Court, which is as follows (1):—

The only question for our consideration is, whether, when one of the Bench of Magistrates who heard the evidence on the first day on which the case was taken up did not sit on a subsequent day when further evidence was taken, this fact vitiates the decision of the Bench in which he took part.

We have to remark that the case was one of an impending breach of the peace, and from the record we find that the District Magistrate, on the 5th of December 1877, referred the Police Report to a Deputy Magistrate, Babu Trailakya Nath Sen, that enquiry might be made with the view of taking recognizance from certain persons. The Judge states in his letter of reference that the case was referred to a Bench of Magistrates consisting of the Deputy Magistrate referred to, stated to be vested with 2nd class powers, and an Honorary Magistrate, but we find no order in the record by which the District Magistrate referred the case to any Bench.

1878

BARODA
PROSUNNO
CHUCKER-
BUTTY.

Judgment.

The Judge, however, does not impugn the competence of the Bench to deal with the case. We will, therefore, assume that the Bench exercised 1st class powers; for in no other case was it competent to deal with matters to which section 491, Criminal Procedure Code, applies.

The proceedings, commenced before Babu Trailakya Nath Sen and Babu Chandra Nath Sen, should have been continued and finished before these gentlemen, and as this was not done, we consider that the proceedings were illegal; Had Babu Trailakya Nath Sen been a Magistrate vested with the necessary (1st class) powers for dealing with the case, it might be that the proceedings would not have been open to question; but he is only invested with 2nd class powers, and therefore the illegality of the proceedings seems to us beyond a doubt. The order of the Bench must, therefore, be quashed.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF BEPUTOOLLA. COMPLAINANT; May 9.

vs,

NAJIM SHEIKH AND OTHERS ACCUSED.

Section 222, Code of Criminal Procedure—Summary Trial—Jurisdiction—Police-investigation—Discharge by Magistrate of persons sent in by Police.

It is the nature of a complaint which should determine whether a case should be tried summarily under section 222 of the Code of Criminal Procedure. Where the acts complained of amount to an offence which a Magistrate cannot try summarily, he is not competent to hold a summary trial.

In the Matter of Dwarkanath Mojoondar, 21 W. R. 89, and Chunder Seekor Thakoor, 22 W. R. 29, followed.

When a Magistrate has referred a case for police-investigation and the police arrest certain persons, and send in evidence against them, he is bound to consider that evidence before he discharges them.

THIS was a case referred by the Sessions Judge of Mymensingh to the High Court, as a Court of Revision, that certain orders passed by the Magistrate, convicting some persons in a summary trial and discharging others, might be set aside as contrary to law.

1878 The facts of this case are sufficiently shown in the judgment
 BEPUTOOLLA of the High Court (1), which was delivered by

v.
 NAJIM
 SHEIKH.

PRINSEP, J.:—

Judgment.

PRINSEP, J.

It appears that one Beputoolla complained to the Magistrate that Nazim and Immam Buksh had carried off and beaten him and his brother Alimooddin some thirty days previously. After recording his examination the Magistrate ordered a police-investigation. While that investigation was proceeding, Alimooddin died, and the police arrested and sent in Idhur and Ranoo, accused, of culpable homicide and wrongful confinement.

The Magistrate discharged these two men with the following order: "I find the police have sent up Idhur and Ranoo who were never accused. They must be discharged, and the police directed to send up Nazim and Immam Buksh, who alone were accused. The case is one under section 341, and cannot be exaggerated into anything more."

The Magistrate then, in a summary trial, convicted Nazim and Immam Buksh under section 341 of wrongful restraint, and, in doing so, remarked: "Considering the nature of the oppression, and that the complainant and his brother were probably beaten, I must pass some thing more than a nominal sentence." The sentence passed was Rs. 25, or in default seven days' imprisonment.

The case has been referred to us by the Sessions Judge, because he considers on the authority of the cases reported in 31 W. R. 89, and 22 W. R. 29, that the offence has been wrongly tried in a summary manner, the offences originally charged being such as could not be so tried.

There can be no doubt that some of the acts originally complained of amounted to an offence (wrongful confinement) which the Magistrate could not try summarily, and that it has been held in the cases quoted, in which we agree, that it is the nature of the complaint made which should determine whether the case should or should not be tried summarily. Therefore the Magistrate's proceedings were altogether irregular as regards the two persons whom he convicted of wrongful restraint

We observe, however, that the Magistrate has distinctly found that the death of Alimooddin after some interval cannot be attributed to any injuries received in the commission of the offences complained of.

1878
BEPUTOOLLA
v.
NAJIM
SHEIKH.

Judgment.
PRINSEP, J.

As regards Idhur and Ranoo who were sent in under arrest by the police after the investigation ordered by the Magistrate, we cannot find any order of the Magistrate directing this enquiry. We are inclined to think that the Magistrate ordered this investigation under section 146, because he saw cause to distrust the complaint made to him; but, however that may be, the police-officer was competent and acted perfectly correctly in arresting those against whom, in his opinion, the offence was proved. The reasons assigned by the Magistrate for releasing these men are altogether insufficient, though it was open to him, and he may have intended to discharge them because he did not believe that they were implicated, inasmuch as they were not named in the first complaint. At all events, with the police-report and the evidence on which these persons were arrested before him, he was bound to consider that evidence before he summarily discharged these men.

Having pointed out the law, and considering the time that has passed, as well as the nature of the offence, and that the accused convicts have not practically been prejudiced, we think it unnecessary to re-open these proceedings.

-[CRIMINAL REVISIONAL JURISDICTION.]

May 21.

IN THE MATTER OF GANGOO SINGH AND OTHERS.

Section 211, Penal Code—Order of discharge in original complaint—When prosecution for false complaint may be instituted.

A Magistrate is not competent to discharge the accused in a warrant-case, and order the complainant to be prosecuted for making a false complaint, until he has examined all the witnesses cited by the complainant.

CASE referred by the Sessions Judge of Gya to the High Court, as a Court of Revision, that the order of the Joint-Magistrate of Nowada, directing certain persons to be prosecuted for making, and abetting the making of, a false complaint, might be set aside as contrary to law.

The facts of this case sufficiently appear from the letter of the Sessions Judge:—

A petition was presented to the Collector of Gya by one Gangoo Singh and others, accusing a Kanungo, Basarat Hossain, of extorting money from petitioners. This petition was forwarded to the Joint-Magistrate in charge of the Sub-division of Nowada for investigation; and that officer, on April 5th, discharged the accused Basarat Hossain, and ordered the prosecution of three of the petitioners, Resal Singh, Gouri Sunkar, and

Gangoo Singh, under sections 211 and 109 of the Indian Penal Code. "I am of opinion that the order of discharge and the order for prosecution under sections 211 and 109 were both illegal, and should be set aside on the following grounds, viz. :—

1878

GANGOO
SINGH.

Judgment.

"1st. That the Joint-Magistrate had not examined all the witnesses named by the complainant, and who were present in Court. (See section 215, explanation 3, and cases of *Srinath Mundle*, 24 W. R., p. 62, and *Q. vs. Heera Lal Ghose*, 13 W. R., p. 37.)

"2nd. That the sanction of the Collector was necessary under section 468 of the Criminal Procedure Code before a prosecution under section 211 could be ordered, inasmuch as the alleged offence (viz., the institution of a false charge) was committed in the Collector's Court in which the petition containing the charge was filed."

The following order was passed by the High Court (1) :—

In this case, the investigation upon the complaint of Gangoo Singh and others not having been completed by the Joint-Magistrate, he should not have ordered the prosecution of the complainants under sections 211 and 109 of the Penal Code. We therefore set aside the order of the Joint-Magistrate ordering prosecution of the original petitioners before the Collector.

(1) MITTER and MACLEAN, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
June 24.

IN THE MATTER OF NOOR-OOOL HUK AND ANOTHER.

Section 502, Code of Criminal Procedure—Forfeiture of recognizance—Excessive amount—High Court as Court of Revision—Power of Government.

The High Court, as a Court of Revision, has no power to reduce the amount of a recognizance that may have been forfeited. The Magistrate of the District should, in such a case, address Government.

Nilmadhub Ghosal, 19 W.R. 1, cited and followed.

CASE referred by the District Magistrate of Jessore to the High Court, as a Court of Revision, that the order of the Assistant Magistrate of Khoolna, forfeiting the recognizances of two persons to keep the peace, might be modified, the amount being excessive and beyond their means to pay.

The following judgment was delivered by the High Court (1):—

In the case of *Nilmadhub Ghosal*, reported at p. 7, Criminal Rulings, 19 W. R., a Bench of this Court held that we have no power to reduce the amount of recognizances which have been forfeited. The Bombay High Court has expressed the same opinion.

The papers must be returned. The Officiating Magistrate should refer the matter to Government if he thinks the amount of the recognizance was excessive.

(1) AINSLIE and BROUGHTON, 77.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF KETABDI MUNDUL.

May 9.

Act I. of 1871 (Cattle Trespass Act), section 21—Bench of Magistrates—Jurisdiction—Fine—Imprisonment on non-payment of fine—Repayment to complainant of court-fees.

The illegal seizure of cattle, under section 22 of the Cattle Trespass Act (I. of 1871), is not a criminal offence. The law allows certain Magistrates to adjudicate compensation to a party injured by an illegal seizure. Court-fees paid by the complainant may form part of such compensation.

It is not lawful to pass a sentence of fine, or of imprisonment, in default of payment of the compensation, awarded in a matter under section 21 of the Cattle Trespass Act (I. of 1871).

CASE referred by the Magistrate of Furreedpore to the High Court as a Court of Revision, that the order of a Bench of Magistrates, sentencing a person under section 21 of the Cattle Trespass Act (I. of 1871), might be set aside as contrary to law.

The facts sufficiently appear from the judgment of the High Court (1), which was delivered by

PRINSEP, J. :—

PRINSEP, J.

In referring this case the Magistrate should have set forth the purport of the order which he considered to be contrary to law.

It appears from the record that Ketabdi Mundul has been convicted by a Bench of Magistrates, and fined Rs. 10, under section 21 of the Cattle Trespass Act (I. of 1871), of which Rs. 5 have

1878

In re

KETABDI
MUNDUL.

Judgment.

PRINSEP. J.

been given as compensation to the complainant, and he has also been sentenced to imprisonment in default of that fine.

We have no doubt that the illegal seizure of cattle, as provided for by section 22, Act I. of 1871, is not an ordinary criminal offence. Jurisdiction is given to certain Magistrates to adjudicate compensation to any person complaining of, and proving such seizure for, the loss caused by the seizure and detention, as well as any fines and expenses incurred by the complainant in procuring the release of his cattle.

There is no law that we are aware of subjecting the wrongdoer also to a fine. The order, therefore, subjecting him to a fine of Rs. 5 in addition to the sum of Rs. 5, which must be regarded as compensation, is illegal, and must be set aside; this fine, if paid, being refunded.

Nor is the alternative sentence, of imprisonment on default of payment of fine legal; and that part of the order must also be set aside, since the law does not provide for any such imprisonment as it does in cases of compensation under section 209 of the Code of Criminal Procedure.

We are of opinion also that any expenses, in the shape of court-fees, that the complainant may have incurred in this matter of procuring the release of his cattle, can properly be recovered under section 22 of the Cattle Trespass Act.

It is doubtful, however, whether any part of the proceedings before us is legal, as it is not clear whether a Bench of Magistrates can have jurisdiction over such a matter; and to enable us to decide this point, we must enquire from the Magistrate of the District, whether the Bench is authorized to receive and try charges without reference from him. At any rate, in justice to the party concerned, we must at once set aside so much of the order as is obviously illegal, reserving our final order until the requisite information regarding jurisdiction is supplied.

[The remaining portion of the Magistrate's order was set aside on June 3rd, as it was found that the Bench of Magistrates had no authority to deal with the case.]

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF MOTHOOOR CHUNDER } PETITIONER.
DASS }

1878
May 27,

Order to open road—Application for a jury—Local enquiry—Section 521, Code of Criminal Procedure.

When the person on whom a notice has been issued under section 521, Code of Criminal Procedure, applies for a jury, the Magistrate is bound to appoint one, and cannot decide the matter by a local enquiry.

REFERENCE to the High Court, as a Court of Revision, by the Sessions Judge of Jessore, that the order of the Assistant Magistrate of Khoolna might be set aside as contrary to law. The facts of the case appear from the letter of the Sessions Judge:—

One Mothoor Thunder Dass, in a petition dated 10th Magh 1284 (22nd January 1878), petition the Assistant Magistrate of Khoolna, praying that order should be passed for a road, which he calls in his petition "mine," to be opened.

Subsequently a notice of the 26th January, and which may be considered as having been passed with reference to section 521, Code of Criminal Procedure, was issued by the Assistant Magistrate, and objection was made by the applicant Haranundo Bhattacharjee in a petition dated the 28th Magh 1284 (9th February 1878), in which, *inter alia*, a jury (or, as it is called in the petition, a punchayet) was applied for.

No jury, however, was granted, and on the 5th March an order was passed, sending the papers to a Sub-Deputy Magistrate for enquiry. The Sub-Deputy Magistrate accordingly visited the spot, made a local enquiry, and submitted a report, with the depositions of certain witnesses annexed, on the subject. On the strength of this report 'corroborating,' the Magistrate says, 'his own knowledge of the place before obstruction was made,' the Magistrate, by an order of the 15th of March, directed that the road which had been closed should be opened within three days, &c.

I am of opinion that the Assistant Magistrate's order is bad in law, and that it should be set aside. In the first instance, action

1878

In re
MOTHOOR
CHUNDER
DASS.

Judgment.

was taken, as it may fairly be held, with reference to section 521, and although a punchayet was applied for, no notice, so far as it appears, was taken of this request, but after a local enquiry, held by the Sub-Deputy Magistrate, by the order of the Assistant Magistrate, who is in charge of the sub-division, but who is not a Magistrate of the first class (*vide* section 533), the Assistant Magistrate passes the order of the 15th March, directing the opening of the road within three days.

Although it is true that the applicant, Mothoor, in his petition to the Magistrate, said that the road was his, the Assistant Magistrate has held that the road was a public one, and the Sub-Deputy Magistrate, that it ultimately acquired by long use the character of a public road; and it is not regular or fair to the present petitioner, after, in the first instance, proceeding, as it may be held, with reference to section 521, to ignore his request for a punchayet, and to pass the order of the 15th March after the enquiry by the Sub-Deputy Magistrate.

Had a jury been appointed, grounds might have been shown by the applicant sufficient to make out a case in his favour. I may add with reference to the ruling in 21 W. R., p. 25, no opportunity appears to have been given to the present petitioner of rebutting the Deputy Magistrate's report. Moreover, as I have previously intimated, the Deputy Magistrate was not deputed by a Magistrate of the first class.

The following order was passed by the High Court (1):—

We concur with the Sessions Judge in thinking that the Assistant Magistrate's order of 15th March was illegal.

A jury having been demanded under section 523, the assistant Magistrate was bound to appoint one, and his subsequent proceedings must be considered not to have been in accordance with Chap. 39 of the Procedure Code. The order of the 15th May will, therefore, be set aside.

(1) MITTER and MACLEAN. 77.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF SHER MAHOMED AND ANOTHER.

1878
June 12.

Section 227, Code of Criminal Procedure—Sentence of imprisonment and fine—Summary trial—Right of appeal—Duty of Appellate Court—Re-trial.

Where a Magistrate of the first class passes a sentence of imprisonment and fine, his order is appealable. He cannot therefore, in such a case, make up his record in the manner described by section 227 of the Code of Criminal Procedure.

It is competent to a Court of Session to order a re-trial of a case which is before it on appeal.

CASE referred by the Sessions Judge of Mymensingh to the High Court as a Court of Revision, that the order of a Magistrate, convicting and sentencing the accused in a summary trial, might be set aside as contrary to law. The facts of the case appear sufficiently from the following order of the Sessions Judge, and the judgment of the High Court:—

This is an appeal from summary orders of the Magistrate of the District, passed in the course of a summary trial, and dated respectively the first and 5th of May. The orders on these dates constitute the summary and reasons given by the Magistrate.

The complainant in the case was examined by the Joint Magistrate on the 17th of April. Of his examination there is the following record: "Nilram Kaibarta on solemn affirmation: 'I brought fish from Dacca for sale here. When I came near Bagadaree Cutcherry, that of Mohima Baboo, two men came and told me to bring in my boat, as Datta and Brahma Mahasoys wanted fish. I refused, and then went on, and when I stopped, several men, six, seven, came and removed fish, and threatened me with lathies. Don't know them. Rs. 3-4 value of fish taken.'" A police enquiry was ordered by the Joint-Magistrate, and the Magistrate of the District subsequently took up the case.

On the 19th of Bysack 1285, corresponding with the 1st of May 1878, the accused prayed through their vakeels that, as the fish had been looted, according to the complainant's allegation, the complaint might not be tried summarily.

[CRIMINAL.]

C. L. R., 29.

1878

In re
SHER
MAHOMED.

Statement.

—

The Magistrate, however, tried the case summarily, rejecting the prayer of the accused, and sentenced them to one month's rigorous imprisonment, and a fine of Rs. 20 each, and in default fifteen days each, and directed that Rs. 20 should be given to the complainant as damages. Although an appeal lies to this Court from the Magistrate's order, he has not recorded the evidence of the witness, nor his reasons for passing the judgment, but has prepared a record after the form prescribed by section 227 of the Code of Criminal Procedure, except that the date on which the proceedings terminated is not given in the form. It would seem that the Magistrate thought that an appeal did not lie from the order; for he has recorded a note as follows on the printed notice of appeal sent to him by this Court, under section 279, Code of Criminal Procedure: "Government Wakeel is requested to attend and point out that the case was actually under section 447, Penal Code, and no other, and is not appealable as far as the sentence goes." The Magistrate, however, is mistaken, as, under the second paragraph of section 274 of the Code of Criminal Procedure, an appeal clearly lies from his order.

As regards the Magistrate's "summary and reasons", for conviction, the statement commences as follows: "The complainant is a trader who brought up fish from Dacca to sell. He was stopped at Bagadaree, and fish of Rs. 4 looted by the people of a zemindar, as he believed. The fact of loot is admitted also by a pleader for the defence who is engaged by the zemindar whose people were suspected." This part of the summary is dated the 1st instant; but there are other remarks recorded on the 5th instant, and then at the very close of these, there is the following: "N.B.—I have omitted to record that it appeared also that defendants, after their act, offered or pretended to offer payment, but complainant did not believe them—was frightened." This reduces the offence to trespass."

There is thus the unusual circumstance that, whilst one offence, which the Magistrate describes as "loot," is found to have been committed in the earlier part of this summary, a *nota bene* at the close of it states that the offence was reduced, on grounds given, to "criminal trespass."

I must say, however, that, besides this inconsistency, the reasons

given for the offence being reduced, seem to me altogether inadequate. If a boat is entered upon and fish taken therefrom under threats of *lattees*, the fact that payment was afterwards offered does not of itself reduce the offence from extortion to more criminal trespass.

1878
In re
SHER
MAHOMED.
Statement.

It appears clear to me that the charge in this case was one which should not have been tried summarily. *Primâ facie*, according to the statement of the complainant on solemn affirmation before the Joint-Magistrate, the charge was one of extortion; and, according to a very recent ruling of the High Court based on other precedents, but passed on a reference from this Court, the Magistrate should not have tried the case summarily.

The order of the Magistrate is now before the Court on appeal; but I am of opinion that there should be a new trial according to the procedure laid down in Chapter XVII. of the Code of Criminal Procedure. A copy of the judgment of the High Court in the case noted in the margin (1) was sent to the Magistrate of the District, and the learned Counsel for the prisoners has informed the Court that he drew the officer's attention to it. Under section 34.(4) of the Code of Criminal Procedure, with special reference to that ruling, this Court would probably be justified in declaring the Magistrate's proceedings void, but there is no authority given in the Criminal Procedure Code to the Sessions Court to direct a new trial under such circumstances as are here found.

Section 284 of the Code of Criminal Procedure provides only for the case of conviction by a Court, not having jurisdiction, of an offence not triable by such Court.

Under these circumstances, I think the best course to pursue is to refer the case for the consideration of the Honourable High Court, in order that the Court, if they consider the view herein taken a correct one, may declare the proceedings void, and direct a new trial by the District Magistrate. Pending the result of this reference the prisoners will remain, as heretofore, in jail.

The following judgment was delivered by the High Court (2):—

This is a reference from the Sessions Judge of Mymensingh,

(1) Reported *ante*, p. 374.

(2) AINSLIE and BROUGHTON, JJ.

1878
In re
 SHER
 MAHOMED.
Judgment.

under section 296 of the Criminal Procedure Code. The case came before the Judge on appeal from an order, which clearly was appealable under the 2nd clause of section 274. By section 280, as amended by section 28, of Act XI. of 1874, the Appellate Court had the power to order the case to be re-tried if it thought fit to do so. This reference was not necessary; and we think that the proper course will be to return the record to the Sessions Judge; with instructions to him to dispose of the appeal himself.

The Sessions Judge is quite right in the view that he takes of the proceedings of the Magistrate. Section 227 only applies to cases where no appeal lies. As the Magistrate in this case has passed an order awarding punishment of two kinds, namely, imprisonment and fine, an appeal did lie from his order; and therefore he could not legally make such a record as he has prepared under section 227.

It appears that the prisoners have already been more than two weeks in jail; and it will be a question for the Judge to consider whether, under the circumstances, this is not a sufficient punishment for the offence which would appear to have been committed if the story of the complainant be taken to be true. If the Judge takes this view of the matter, it will be mere waste of time for him to direct a re-trial. That is a question which must be dealt with at his discretion.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF RAM SOONDER PODDAR AND OTHERS.

1878
June 13.*Sections 406, 409, Indian Penal Code—Jurisdiction—Adequate sentence—
Court of Revision.*

Where a Magistrate, erroneously holding that the offence committed was one under section 406, Indian Penal Code, over which he had jurisdiction, instead of under section 409, which was cognizable only by the Court of Session, tried and sentenced the accused, it was held by the High Court as a Court of Revision that his proceedings were contrary to law, and he was directed to commit the case for trial by the Court of Session.

To constitute an offence under section 409 it is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity.

CASE referred to the High Court as a Court of Revision in order that the order of the Deputy Magistrate of Noacolly, convicting and sentencing the accused under section 406 of the Indian Penal Code (criminal breach of trust), might be set aside as contrary to law.

The facts of this case appear from the following letter of the District Magistrate referring the case:—

Briefly the facts are these: The Treasury is a public office established by Regulation II. of 1793, for the special object of receiving and accounting for the land-revenue payable by landholders to Government. The accused were the men appointed to receive cash in that office according to that law. Talook Siton Gazi is one of the estates bound to pay land-revenue into the Treasury, and the occasion was that of the latbundi, or latest day of payment of the revenue. For these public officers to misappropriate, as they are proved to have done, a sum paid under these circumstances, is about the most glaring and heinous breach of trust they could well commit.

Their assurance is astonishing. Every payment is by challans; the payor must get his papers entered in the Account Department,

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and thus pay the cash into the Treasury; when that is done the payment is credited in the Treasury Cash-book, and this book and the Accounts Register are compared daily. One of the accused, Ram Soonder, however, was customarily allowed to write the Treasury Cash-book, which is the duty of the Treasurer; so he had the whole matter in his own hands. When the accounts were compared, he coolly struck out the item of Rs. 16 which had been entered as paid by Talook Siton Gazi, and thus balanced the books. But his impudence did not stop even at this. By misappropriating this sum, and falsifying the book, he caused the estate Talook Siton Gazi to appear as one which had defaulted for its Government revenue, and, according to Regulation I. of 1793 and subsequent laws, that estate was brought to sale for the arrear. Ram Soonder then actually bid for and bought this estate at the public sale held by the Collector. Forging a Treasury Cash-book, and bidding at a land-sale, are punishable under sections 169 and 405, &c., of the Penal Code, and, I should have thought, were tolerably well-known to be serious offences. Ram Soonder bought the estate in his own name, and is said to have immediately sold it to its original proprietor by deed of sale; so there is a good reason to suppose that his object all through was, not merely to annex a paltry sum of Rs. 16, but to obtain a valuable hold on the landholder. Section 15 of Regulation II. of 1793 makes an estate bought by a public officer in this way, a forfeit to Government; but Ram Soonder bidding in his own name in the Collector's presence is only in keeping with his *sans-froid* throughout the whole affair. The two men who have been convicted are shown to have sat together and acted together. Durga Churn appears not to have had any hand in the embezzlement, though it is hard to believe that any one in the Treasury did not know of it. The common plea of press of work is alleged as the cause of the "gólmal;" but though there often is a press of work on latbundi day, there does not appear to have been any worth mentioning on this day. If there had been so, the Treasurer and the 3rd Poddar, Durga Churn, would have been actively employed with the two others who are convicted in receiving the payments, inasmuch as receiving the land-revenue is there first and foremost duty. But the Treasurer allowed Ram Soonder to write the Cash-book,

which is no part of his regular duties, and he says, Durga Churn was employed on stamp work, which is very secondary matter, and could be postponed to almost any time. The number of transactions also shows that there was no serious press of work, even if such an excuse were of the slightest value, which it is not.

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The only thing I can do is, to refer the case to the High Court under section 296, with a view to quashing the conviction.

The following judgment was delivered by the High Court (1) :—

We annul the trial held by the Deputy Magistrate, Anwar-uddeen Ahmed, and order that a new trial be held before the Court of Session, and that proceedings be taken to commit the prisoners for trial under section 409 of the Indian Penal Code accordingly.

Section 409 does not, as supposed by the Deputy Magistrate, require the property, in respect of which criminal breach of trust is committed, to be the property of Government, but only requires that it shall be entrusted to a public servant in his capacity as such public servant.

The Deputy Magistrate's view of the punishment proportionate, to the offence leaves altogether unnoticed the fact that one of the accused appears to have deliberately embezzled this money as a means of depriving another person of his property, and of himself acquiring it as purchaser at a revenue-sale, which is a very serious aggravation of the offence of criminal breach of trust.

(1) AINSLIE and BROUGHTON. 77.

[EXTRAORDINARY CRIMINAL JURISDICTION.]

1878
June 18.

IN THE MATTER OF HURRÉE NARAIN MOOKERJEE.

Section 263, Code of Criminal Procedure—Verdict of jury—Case referred by Sessions Judge—Practice of the High Court.

Where there are reasons sufficient to warrant a jury in disbelieving the witnesses, and in giving the prisoner the benefit of the doubt raised by inconsistencies in that evidence, although another jury might have come to a different conclusion, the High Court will not interfere. It must be shown that the verdict of the jury is certainly unreasonable and perverse.

The Queen vs. Sham Bagdee and others, 20 W. R. 73, cited and followed.

CASE referred under section 263 of the Code of Criminal Procedure, by the Sessions Judge of Moorshedabad, because he disagreed with the unanimous verdict of a jury acquitting the prisoner, and considered it to be necessary, for the ends of justice, to submit the case for the orders of the High Court.

Baboo *Fuzdanund Mookerjee* (Junior Government Pleader), for Government.

Baboo *Nilmadhub Bose*, for the Prisoner.

The facts will sufficiently appear from the judgment of the High Court (1), which was delivered by

AINSLIE, J. AINSLIE, J. :—

This case has been referred to us by the Sessions Judge of Moorshedabad, under section 263 of the Criminal Procedure Code.

The prisoner is charged under sections 468, 469, and 471 of the Indian Penal Code—the substance of the charges being that he had fabricated certain letters purporting to have been written by Kally Krishto Chatterjee, the Head Clerk in the Collector's Office, about an application made for an appointment by Rameshwar on behalf of Bhugwan Biswas. The jury unanimously found the prisoner "not guilty." The Judge being of a different opinion has referred the case to this Court.

(1) AINSLIE and BROUGHTON, JJ.

The case for the prosecution rests mainly on the evidence of Rameshur, Bhugwan, Soorao Bewah, and one Ramakunt, in addition to which there is evidence, identifying the writing of two of the letters marked "A" and "B," respectively, as being the handwriting of the prisoner. On going through the evidence of the witnesses, it is clear that in several parts it is not consistent, and that the witnesses probably have not been speaking the simple truth.

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In the case reported in 20 Weekly Reporter, page 73, Criminal Rulings, Mr. Justice. MACPHERSON, speaking of a reference under the same section, says: If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that a real trial by jury is absolutely at an end, and that the verdict of a jury is of no more weight than the opinion of assessors. I presume that, if this were the intention of the Legislature, it would have said so; but the Legislature has not said so."

In this case it may be that another jury would have come to a different conclusion on the evidence; but at the same time there is no doubt that there are reasons for suspicion sufficient to warrant the jury in disbelieving the witnesses in the present case, and in giving the prisoner the benefit of the doubts raised by inconsistencies in their evidence. This is not a case in which we can say that the verdict of the jury is certainly unreasonable and perverse.

Therefore, it seems to me that, following the general practice of this Court, we ought not to interfere.

[CRIMINAL REFERENCE.]

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June 5.IN THE MATTER OF THE EMPRESS *vs.* THE MUNICIPAL COMMISSIONERS OF CALCUTTA.

Public servant—Municipal Corporation—Public nuisance—Corporation of Calcutta—Indian Penal Code, section 21—Presidency Magistrates Act, IV. of 1877, section 39—Act IV. (B. C.) of 1876.

The protection extended by section 39 of Act IV. of 1877 (the Presidency Magistrates Act) to certain individual public servants does not extend to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance.

Per AINSLIE, J.—The right to prosecute any person or body of persons by whom any one may have been injured is a common right which can only be limited by special legislation. Such a right cannot be taken away, unless by express words, or by necessary implication.

Per WHITE, J.—It is doubtful whether a corporation is a public servant at all; but assuming it is, neither the Corporation of Calcutta nor any of its members is a public servant removable by Government.

Where a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense.

Indian Penal Code, section 21; Presidency Magistrates Act, section 39; Act IV. (B. C.) of 1876, discussed. *R. vs. Birmingham and Gloucester Railway*, 3 Q. B. Rep. 223; *R. vs. Scott*, 3 ditto 547; and *R. vs. The Great Northern of England Railway*, 9 ditto 315, cited.

REFERENCE under section 240 of the Presidency Magistrates Act from the Officiating Chief Magistrate of Calcutta, the terms of which are as follow:—

"Section 39 of Act IV. of 1877 provides that no public servant who is not removable from his office without the sanction of Government shall be prosecuted for any act purporting to be done by him in the discharge of his duty *without the previous sanction of Government*. Does this protection extend equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance? The illustration to section

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21 of the Indian Penal Code declares that a Municipal Commissioner is a public servant; and, under section 11 of the same Code, the word "person" is said to include a body of persons, so that a Corporation may be indicted for a public nuisance. It seems to me that a Municipal Corporation is entitled as a body to the same privileges as the individual Municipal Commissioners who compose it, and all the more so, as such a Corporation is liable to be treated under the Indian Penal Code. If this view of the case is correct, it would seem to follow that the protection afforded by section 39 of Act IV. of 1877 is a privilege enjoyed by Municipalities appointed by Government. It may not be out of place here to draw attention to the fact that the law contained in section 39 of Act IV. of 1877, and in section 466 of the present Code of Criminal Procedure, is more stringent than that contained in section 167 of the repealed Procedure Code, Act XXV. of 1861."

Phillips and Gasper, for the Prosecution.

Piffard, for the Municipal Commissioners.

The following judgments were delivered by the Court (1) :—

AINSLIE, J. :—

AINSLIE J.

The question referred by the Presidency Magistrate is, whether the protection extended by section 39 of Act IV. of 1877 to certain individual public servants extends equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance. By section 11 of the Penal Code the word "person" is defined to include a body of persons, whether incorporated or not; and therefore the word "person" in section 21 may be read as a body of persons incorporated. The words "public servant" in that section may consequently denote a body of persons incorporated, falling under any of the descriptions given therein. It is not necessary to refer to any except the 10th. The illustration in the 10th description says that a Municipal Commissioner is a public servant. But it does not, therefore, follow that a Corporation, such as that created by Act

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IV. (B. C.) of 1876, is also a public servant within the meaning of that section.

The words "every officer" in the 10th description seem rather to point to an individual than to an incorporated body; but assuming for the purposes of this reference that the Municipal Corporation of Calcutta is a public servant within the meaning of section 21 of the Penal Code, still it seems to me that it does not come within the provisions of section 39 of the Presidency Magistrates Act.

By that Act, no such Judge or public servant, as is described in that section, shall, unless with the previous sanction of Government, be prosecuted for any act purporting to be done by him in the discharge of his duty. The class of public servants referred to consist of those who are "not removeable from office without the sanction of Government." It appears to me that this description must be read in its entirety, and that the words "not removeable from office" cannot be separated from the following words, "without the sanction of Government." But if the whole be read as describing the class exempted from prosecution, except with the previous sanction of Government, the description can only be applied to a class not removeable from office at all by dropping the words "without the sanction of Government," which have no meaning as applied to such public servants.

The right to prosecute any person or body of persons by whom one may have been injured is a common right which can only be limited by special legislation; and, in considering whether the right has been taken away, we must see that it is taken away by express words, or by necessary implication.

It does not seem to me that it must necessarily be implied that by the words, "not removeable from office without the sanction of Government," it was the intention of the Legislature to include those who are not removeable from office under any circumstances at all. I see no reason to suppose that the Government must have meant to extend the same protection to a body such as the Municipal Corporation of Calcutta, which cannot be taken under a warrant, or sentenced to imprisonment, which it thought fit to extend to certain individuals in the service of that Corporation, who, no doubt, are protected by section 32 of the Calcutta

Municipal Act, and section 39 of the Presidency Magistrates Act. The answer which I would, therefore, give to the question referred to us by the Magistrate is, that the protection does not extend to a Municipal Corporation prosecuted under the Indian Penal Code.

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I am of the same opinion. The question submitted to us by the Presidency Magistrate turns entirely upon the meaning and true construction of section 39 of the Presidency Magistrates Act. It is not disputed, nor could it be disputed, that, unless that section applies to the Corporation of the Town of Calcutta, it is liable under the Penal Code to be prosecuted for a nuisance in the same way as if the offence had been committed by an ordinary individual. A Corporation may be proceeded against criminally as well for a misfeasance as for a nonfeasance. *Reg. vs. The Birmingham and Gloucester Railway Co.*, 3 Q. B. Rep. 223; *Reg. vs. Scott*, 3 ditto 547; and *Reg. vs. The Great North of England Railway Co.*, 9 ditto 315.

Section 39, as regards a Judge or any public servant not removeable from office without the sanction of the Government, exempts them from prosecution for an offence, except with the previous sanction of the Government. "Government," as, used in the section, means the Government acting in its executive capacity. It is contended that the Calcutta Corporation falls within the category of a public servant not removeable without the sanction of the Government. I think it is open to much doubt whether the Corporation, as distinct from its individual members, is a public servant at all, as these words are defined by the 21st section of the Penal Code which is incorporated with the 39th section of the Act under consideration. Assuming, however, for the purpose of the argument that that point is decided in favour of the defendants' contention, it seems to me clear that the Calcutta Corporation does not come within the description of a public servant irremoveable from office without the sanction of Government. The Corporation is created by Act IV. (B. C.) of 1876. By the 4th section of that Act certain persons, to the number of seventy-two, who are styled Commissioners, and of whom forty-

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eight are elected by the rate-payers, and twenty-four appointed by the Government, are incorporated by the name of the Corporation of the Town of Calcutta.

The Corporation is to have perpetual succession, a common seal, and by its corporate name to sue and be sued. There is no provision in the Act for putting an end to the Corporation, or for removing or dismissing it, either with or without the sanction of Government, which means, as I have said, the executive Government. It can only cease to exist by an Act of the Legislature, and, until and unless the Legislature interferes, its corporate life must continue. The words, "public servant not removeable without the sanction of Government," are wholly inappropriate to describe the legal position of such a Corporation.

Again, if it were necessary to go beyond the Corporation, and consider the position of the seventy-two members comprising it, they appear to be equally without the particular description of public servant mentioned in section 39 of the Presidency Magistrates Act. By section 22, they are elected for a term of three years, and continue in office during that term. Section 23 enumerates the circumstances under which, and the only circumstances under which, they cease to be members of the Corporation. Those circumstances are death, resignation, or disqualification—the disqualification being that which may arise from their being bankrupt, or interested in a contract with the Corporation, or being absent from Calcutta for six consecutive months, or being sentenced to a term of imprisonment. So that, looking behind the Corporation, if I may so say, to the members who constitute it, it cannot be said of them any more than of the Corporation that they are persons who are not removeable without the sanction of Government.

Mr. Piffard has argued that the words in section 39, which we are now considering, are intended to embrace two classes of public servants: first, those who are not removeable from office at all; and, secondly, those who are removeable only with the sanction of Government. But I am unable to agree with him that that is the true construction of the words in question. They appear to me to point to one class, and one class only, of public servants,

viz., that class which is removeable only with the sanction of Government. The words are satisfied by applying them to that class, and where, as here, a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. Mr. Piffard's contention would require us to construe the section as if its language had been, "any public servant not removeable from his office, or, if removeable, not removeable without the sanction of Government." In fact, to warrant the construction contended for, some additional words would have to be introduced, and this circumstance, I think, is fatal to the argument.

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I agree with my brother AINSLIE that, if we look to the reason of the privilege conferred by the 39th section, there is a marked distinction between the case of a public servant whose removal required the sanction of Government and that of a Corporation in the position of the Calcutta Municipality. The Government may have an interest in protecting the former from prosecution without their previous sanction, but no interest in protecting the latter from the consequences of their own acts. Moreover, the Corporation, if convicted, cannot be punished by imprisonment, but only by fine. The Legislature must have thought it a matter of importance that no public servant whose removal requires the sanction of Government should be subjected to imprisonment without its sanction, but the same reasons for requiring Government sanction do not apply when the result would be merely the infliction of a fine which must ultimately be paid by the rate-payers of the Town of Calcutta. I concur, therefore, in the opinion that the question which has been submitted to us by the Presidency Magistrate must be answered in the negative.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
June 6th.

No. 482
of 1878.

IN THE MATTER OF ABDOOL KADIR AND OTHERS (CONVICTS).

*Summary Jurisdiction—Splitting Offences—Offences triable summarily—
Void Proceedings—Code of Criminal Procedure, section 34.*

A Magistrate should not split up an offence for the purpose of giving himself summary jurisdiction. If he does so, and the offence is not triable summarily, the proceedings are void, under section 34 of the Code of Criminal Procedure.

REFERENCE from the Sessions Judge of Cuttack. The facts of the case are sufficiently shown in the Judge's letter, which is as follows:—

"Under the provisions of Circular No. 18 of 15th July 1863, and section 296 of the Criminal Procedure Code, I have the honor to submit, for the orders of the High Court, the records of *Empress vs. Abdool Kadir and others* and of *Empress vs. Ghulam Mahomed*. It seems to me quite clear that the Deputy Magistrate had no right to take the case up summarily, as it was alleged that the members of the alleged illegal assembly were armed. This being so, the offence was one under section 144, and not under section 143. In the same way, Ghulam Mahomed, who is charged with hiring persons to join an unlawful assembly, was punishable, if the members of the assembly were armed, under the provisions of section 144, and therefore could not be tried summarily."

Mr. M. L. Sandel for the accused.

The judgment of the High Court (1) was delivered by

AINSLIE, J. AINSIE, J.:—

Section 274 of the Code of Criminal Procedure takes away the right of appealing from persons convicted by Magistrates of the first class exercising summary jurisdiction, when the sentence is

(1) AINSIE and BROUGHTON, JJ.

one of imprisonment not exceeding a term of three months. Therefore, in the present case, the convicted persons, having been sentenced to a term not exceeding three months, are deprived of the right of appeal on the facts, if the Deputy Magistrate was right in trying the case summarily.

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The Deputy Magistrate seems to think that the fact that he had not the police-papers at the time that the prisoners were put on their trial entitled him to deal with the case on the verbal statement of a Court Sub-Inspector. But, on looking at the record, it appears that the very first witness for the prosecution states distinctly that there were two persons, who appear to have been the leaders of the unlawful assembly (if the evidence of this witness is to be believed), armed with swords. It is quite clear that the Deputy Magistrate should have looked to the sworn evidence before him, and not to any verbal statement of a Court Sub-Inspector, for the purpose of determining how the trial was to be conducted; and when he found that the charge actually made before him was a charge which would not fall under any section of the Penal Code admitting of summary trials, the proceedings should have been framed as in ordinary trials.

If this conviction had been recorded under section 144, the accused would have had a right of appeal. This Court has frequently laid down that no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction. If a charge of an offence, not triable summarily, is laid and sworn to, the Magistrate must proceed to deal with the case accordingly, unless he is, at the outset, in a position to show, from the deposition of the complainant, that the circumstances of aggravation are really mere exaggeration, and not to be believed.

As the Deputy Magistrate was bound to treat this case as a charge under section 144, it follows from the construction that has been put on the 34th section of the Criminal Procedure Code that we are bound to hold this proceeding void. All these proceedings must, therefore, be quashed, and the Deputy Magistrate, must try the prisoners *de novo*. The same order will be made in the case of Gholam Mahomed.

[CRIMINAL APPELLATE JURISDICTION.]

1878
June 4th.
No. 235
of 1878.

HARI SINGH AND OTHERS APPELLANTS ;

AND

THE EMPRESS OF INDIA RESPONDENT.

Common Object—Unlawful Assembly—Prosecution of the Common Object—Penal Code, section 149—Act XLV. of 1860, section 149.

If a body of men armed with *latties*, and under the leadership of one who, to the knowledge of the rest, is armed with a gun, assemble for the purpose of forcibly carrying off another man's property ; and if, in effecting that purpose, any one of the party, taking the gun, shoots and kills a person who is making a lawful resistance, the whole party may properly be convicted of murder under section 149 of the Indian Penal Code.

The Queen vs. Sabid Ali, 20 W. R., Crim., 5, cited.

CRIMINAL APPEAL from an order passed by the Sessions Judge of Nuddea, convicting the appellants of murder under the provisions of section 149 of the Indian Penal Code. The facts of the case are sufficiently set forth in the following judgments, which were delivered by the High Court (1) :—

MITTER, J. MITTER, J. :—

In this case the prisoners have been convicted of murder under the provisions of section 149 of the Indian Penal Code. The case for the prosecution was that these prisoners, with several others amounting to twenty or twenty-five persons, came armed with *latties* and *soorkies*, and one of them, viz., Tureeboollah, with a gun, to the field of Dowlut Fakir, the first witness for the prosecution, for the purpose of carrying away forcibly the paddy crops that were being reaped by Dowlut's son, Azim, assisted by others. Before they arrived on the spot, Azim had carried a bundle to his home, which appears to be close by. Hearing of the approach of these men, he ran back with a *dað* in his hand. He found the assailants on the other side of a small stream which

(1) JACKSON, MITTER, and MACLEAN, JJ.

divided them from his field. He threatened to attack with the *dað* any person who would come to his land. Upon this, Hari Singh, Tureebollah, and several others, jumped over the *khāl*, and got into the land, the crops of which were being reaped. Then, further altercation and interchange of abuse between the parties followed, whereupon Hari Singh took the gun from Tureebollah, and shot Azim Fakir dead. This is briefly the story of the prosecution.

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On these allegations Hari Singh was charged with murder under section 302, and the other prisoners also with the same offence under section 149, as having been members of an unlawful assembly, in prosecution of the common object of which one of their members, viz., Hari Singh, committed murder.

Hari Singh has been acquitted of murder under section 302, but he and the others have been convicted of the same offence under section 149. Hari Singh has been acquitted of murder under section 302, because the Sessions Judge and the Assessors are of opinion that the story of the prosecution, as to the manner in which Azim was shot dead, is not credible.

It seems to me that the conviction of the prisoners of the offence of murder under section 149 is bad. The Court below unanimously held that Azim was not shot dead by Hari Singh. They do not find that any other known or unknown member or members of the unlawful assembly caused the death of Azim Fakir, under circumstances which would constitute the offence of murder as defined in the Code. Not only have they not found this fact, but there is no evidence on the record upon which they could find it. The only evidence that there is on the record showing the circumstances under which Azim Fakir was shot dead has been disbelieved. It seems to me that, upon this ground alone, the conviction of the appellants of the offence of murder under section 149 is unsustainable.

But, supposing that the Sessions Judge and Assessors were inclined to disbelieve the evidence of the prosecution, so far as it attempts to ascribe the death of Azim Fakir to the immediate act of Hari Singh, but that they accepted that evidence as to the manner in which he was shot dead, and supplemented it by an inference that the gun must have been fired by some one of the

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members of the unlawful assembly, under circumstances which would constitute the offence of murder, still, I think, the prisoners should not have been found guilty of that offence under the provisions of section 149 of the Indian Penal Code. But, before I enter into that question, I may remark here that the Judge and the Assessors do not anywhere expressly find these facts; nor would this Court be justified in inferring them from the evidence recorded in this case. Are the circumstances established by the evidence of the prosecution, barring that portion of it which has been rejected by the lower Court, reasonably inconsistent with the supposition that the gun, from the firing of which Azim Fakir was killed, went off accidentally? The circumstances are equally consistent with that theory as with the case supposed by me above. However, even supposing all these facts against the appellants have been established, I do not think that section 149 supports their conviction of the offence of murder.

The section in question has received a careful consideration by a Full Bench of this Court in a case reported at page 5, of the 20th W. R., Criminal Rulings. Following the interpretation of this section by the majority of the Judges in that case (which I am bound to follow), I do not think that the offence of murder can be brought home to the appellants under its provisions.

According to the opinion of the majority of the Judges, the section in question is divided into two branches. The first branch refers to offences committed "in prosecution of the common object." The second branch deals with offences which the members of the unlawful assembly "knew to be likely to be committed in prosecution of that object." It has been almost conclusively shown in that case that the first branch does not include all the offences which any member, during the continuance of the unlawful assembly, might commit. It refers only to those offences which, in the language of Mr. Justice PHEAR, are immediately connected with the common object of the assembly, or as Mr. Justice PONTIFEX has put it, which must "necessarily flow from the prosecution of the common object." Thus, for instance, where the common object of an

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unlawful assembly is to eject a particular person from a house in his possession, and if "in prosecution of that common object" one of the members enters into the house in order to drive the person in possession bodily out of it, all the members under this branch of the section would be guilty of the offences of criminal trespass and assault; because these offences are "immediately connected with," or "necessarily flow from, the prosecution of the common object." But if that member, after entering into the house, wantonly destroys some of the furniture or carries them away, he alone would be guilty of mischief or theft, and the other members, under this branch of the section, cannot be convicted of those offences; because they are not immediately connected with, or do not necessarily flow from, the prosecution of the common object of the unlawful assembly.

Applying this part of the section to the facts of this case, I do not think that the conviction of the appellants of the offence of murder can be supported. Now, what was the common object of the unlawful assembly of which they were members? It was, as found by the lower Court, "not only to prevent Azim Fakir from reaping his paddy, but also to cut it and carry it off themselves." If murder was committed by one of the members of this assembly, I do not think it can be reasonably said that that offence was immediately connected with, or necessarily flowed from, the prosecution of the common object. If, in preventing Azim Fakir from reaping his paddy, he were put in wrongful restraint by one of the members, this would be an offence immediately connected with, or necessarily flowing from, the prosecution of the common object, viz., prevention of Azim Fakir from reaping his paddy; or if one of the members were to carry off a load of paddy, and thereby commit theft, the other members might be found also guilty of theft, because the commission of this offence would be immediately connected with, or necessarily flowing from, the other common object of the assembly, viz., to cut and carry away the paddy themselves. But it seems to me that the offence of murder, if committed by one of the members, cannot be reasonably held to be so connected with either of the common objects mentioned

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above, that it would render all the members guilty of the same offence under this branch of the section.

I now come to the other branch. The interpretation put upon it by Mr. Justice PONTIFEX is, that it refers to an offence which "must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen." In this interpretation, the other two members of the Full Bench, who with him constituted the majority, virtually agree, although they express their view in different language. Suppose, in the illustration put by me above, the members of the unlawful assembly found that they could not encompass their common object, viz., the eviction of the person in possession of the house, because the gate of it was locked. Suppose that one of the members were to break open the lock, it would be an offence which would come within this branch of the section, because it so probably flowed from the prosecution of the common object, viz., eviction of the person in possession from the house, that each member might antecedently expect it to happen. But not the other offence of mischief or theft committed by one of the members by the destruction, or forcible carrying off, of any furniture in or from the house, because they do not so probably flow from the common object that each member might antecedently expect that this would happen. Can it be reasonably said in this case that the murder of Azim, supposing he has been murdered by one of the rioters, so probably flowed from the common objects of the assembly mentioned above, that each member might have antecedently expected it to have happened? I think not. It has been said that the rioters were armed with *latties*, and one of them with a gun, and that they knew that they would be resisted by Azim Fakir and his party; that these facts would, therefore, justify the inference that the members of the assembly knew that murder would likely be committed in prosecution of the object. With deference to my learned colleague who entertains this opinion, I must say that the facts mentioned above do not warrant this conclusion. Under these circumstances, it is not sufficient, for the purposes of this branch of the section, to say that we are satisfied that the members knew that it was possible that murder might be committed during the continuance of the unlawful assembly; but we

must be satisfied of this, that they knew that it was probable that murder would be committed in the accomplishment of the common object. The prisoners, with several others, amounting altogether in number to about sixteen or twenty persons, combined together and came in a body armed with *latties*, &c., to prevent Azim Fakir and his two friends from reaping his paddy, and to carry it off themselves. Under these circumstances, can it be reasonable that each member knew that it was probable that, in order to attain the aforesaid object, some one of them must cause the death of Azim Fakir, under circumstances which make him guilty of the offence of murder? I do not think that it would be reasonable to draw such an inference from these facts.

In order to determine whether the provisions of section 149 are applicable or not, each case must be dealt with upon its own facts and circumstances. But, curiously enough, there is an almost complete coincidence of facts and circumstances between this case and those of the Full Bench case referred to above. This circumstance is so clear that I think I may cite the opinion of the majority of the Court upon the effect of the evidence in that case in support of the conclusion to which I have come. In that case also the rioters were armed with *latties*, &c., and one of them Tureeboollah, with a gun. The object of the rioters was to drive one Fakir-Ban off a piece of land which he was ploughing. So far there is a complete coincidence of facts between the two cases. But, in that case, it was found that the unexpected resistance offered by two persons of the names of Shamed Ali and Shureef Ali, was the immediate cause of the firing of the gun by Tureeboollah which killed one of them. In this case, there is no finding of a fact analogous to this. In fact, the evidence in this case does not show what was the immediate necessity of the firing of the gun which killed Azim Fakir. Therefore, the only difference which exists between the facts of these two cases is a difference which goes in favour of the prisoners. Upon the facts of that case the majority of the Court held that they were not sufficient to establish the offence of murder under section 149 of the Indian Penal Code against each of the members of that unlawful assembly. The opinion of the majority of the Judges in that case, therefore, supports the view which I would take of the facts of this case.

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I would, therefore, set aside the conviction of the appellants of murder under section 149, but it is clear that, upon the evidence believed by the lower Court, they are guilty under the provisions of section 148 of rioting, armed with deadly weapons, and I would reduce the sentence to one of rigorous imprisonment for three years.

MACLEAN, J. MACLEAN, J.—

The only question raised before us is, whether the appellants, who have been convicted of murder, committed by one of the members of an unlawful assembly, have been properly convicted by the application of section 149 of the Indian Penal Code to their case.

There were rival claims to some lands. Dowlut Fakir claimed to be tenant, and carried his claim successfully through all the Civil Courts. According to the Sessions Judge, Hari Singh, one of the appellants and unsuccessful litigants, determined to prevent Dowlut Fakir from enjoying quiet possession; and he accordingly headed a party of armed men who proceeded with the object of seizing the crop which was on the land, and which Dowlut's son, Azim, had begun to reap. From the evidence it appears that Azim had gone home with some of the reaped crop, and that, hearing of the approach of the other party, he returned to his field armed with a *dao*, and threatened to kill or maim any one of them who interfered with his possession. There was an altercation, and Hari Singh and some of his party crossed a small stream and advanced upon Azim. Some one, the Judge and Assessors were unable to say who, fired a gun at Azim, and shot him dead from a distance of ten or eleven cubits.

The question is: Were all the party, one of whom fired the shot, guilty of murder by reason of their being unlawfully assembled, and by reason of the murder having been committed by one of them in prosecution of the common object of the assembly, or by reason of the murder being a likely incident in the prosecution of the common object within their knowledge?

It may be taken as true, and it certainly is not disputed, that murder was committed in prosecution of the common object of the assembly. Hari Singh and his party intended to dispossess

Azim Fakir of his crop, and, on his remonstrating, one of them killed him. The question is: Did they know that it was likely he would be killed? The reasonable conclusion is, that they knew it was likely they would meet with some resistance. Their numbers, and the various lethal weapons they took with them, show this. Then the evidence shows that, although Azim presented a bold and even threatening opposition to them, he was unsupported; and yet, without further provocation from him, he was forthwith shot, before he had time to strike a blow in defence of his property.

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I cannot bring myself to believe that a body of men, who go forth to dispossess another of his fields, most of whom carry lethal weapons, and one of them a gun, do not intend that the weapons, shall be used if necessary; or do not know that, in all probability, the use of the weapons will be followed by their natural result. If a man is to be shot down on his own land, which he has defended through all the Civil Courts, by one of an armed band of men determined to turn him out, and then the assailants are to get off with a comparatively light sentence, because they are not proved to have contemplated killing him, there will be no such thing as security for life in Backergunge. The Full Bench Ruling in 20 W. R., Cr., p. 5, certainly lays down that section 149 does not make it imperative on the Courts to hold all the members of an unlawful assembly guilty of an offence committed by one in prosecution of the common object of all; but it leaves the Courts at liberty to apply that section to each case according to its own circumstances. In the present case, I consider that the section should be applied, and I would affirm the conviction and sentence.

The Judges of the Division Bench having disagreed in their opinions, the case was then referred to Mr. Justice L. S. JACKSON, as third Judge, who delivered the following judgment:—

JACKSON, J.:—

JACKSON, J.

The Assessors, the Sessions Judge before whom the trial took place, and the learned Judges of this Court between whom the difference has arisen, all agree in the opinion that the appellants, without exception, were concerned and present in a riot

[CRIMINAL.]

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whereof the purpose was to restrain Dowlut Fakir and his people from cutting the crops grown upon certain land, the rioters intending to take the crops themselves; that the accused went and committed the riot, being armed with various deadly weapons, and one of the party, apparently one Tureeboollah (not before the Court), carrying a gun; that the aggressors were withstood by Azim Fakir, the son of Dowlut; and that, in the sequel, Azim was killed on the spot by a discharge of this gun.

It is not precisely found by whom, at a violent moment, the gun was fired; and one of my learned colleagues would seem to have had it suggested to him that it may have exploded by accident. In these circumstances, the question which I am called upon to decide is: Whether the conviction of the appellants under section 149 of the Indian Penal Code of the offence of murder is sustainable?

It appears that the right to cultivate the land in question had been the subject of a long and closely-contested litigation between Dowlut Fakir and Hari Singh, in which the former had been successful throughout; and that, after this, the owner of the land, being unfriendly to Dowlut, had let it to Hair Singh and Tureeboollah, so as to unite the Hindoo and Mahomedan parties against that of Dowlut; and, consequently, the riot in which Azim was killed must be regarded as a deliberate attempt to obtain by violence that which the law had declared to belong to the party assailed. Acts of this description have been, and still are, frequent in the district of Backergunge. Firearms are constantly used, and death or severe wounding is a termination by no means uncommon.

In the present case it is proved by the Native Doctor that between sixty and seventy slugs were extracted from the body of the deceased; all having lodged between his forehead and his chest, that is to say, in the face, the throat, heart, lungs, and adjacent parts. The slugs were large enough to break three ribs and six teeth, and having scattered a little, they afford proof that the discharge must have been at a short distance, with the gun pointed at the upper part of the deceased man's body. In this state of things, I am unable to arrive at any other con-

clusion, than that the person who held the gun fired it at Azim, and intended either to kill him or to cause such bodily injury as was likely, in the ordinary course of nature, to cause death, that is to say, that the person committed murder. It seems to have been argued before the Division Bench that the gun had gone off by accident. It would be going only a step further to contend that the weapon had exerted a will of its own, and emitted its contents in spite of the owner. But none of the accused made any such case: on the contrary, one of them, Komul Singh, distinctly said, on examination before the Magistrate, that either Hari Singh or Tureeboollah had fired the gun. I see that he used (in his Bengali statement) the English word "fire," which is well understood by natives. The witnesses for the prosecution, indeed, affirmed that, after crossing the *Khal* which separated them from the deceased, Hari Singh took the gun from Tureeboollah's hand, and shot Azim dead. But the Court of Session had probably sufficient reason for refusing to accept this account as to the precise mode in which Azim had been killed. That murder, however, was committed by one or other of the assailants, appears to me not open to doubt.

The only questions, then, which remain are, whether the murder was immediately connected with, and necessarily or naturally flowing out of, the object of the unlawful assembly, and whether the case was such that those engaged knew that the commission of it was likely. It seems to me impossible to avoid the conclusion that both propositions are true. The contest as to the occupation of the land had been long and obstinate. The parties in possession were determined, and could not be expected to give way unless absolute violence was used. They were in the right, and it was necessary to expel them by force. The attack was not made by a large disorderly mob, of which one part might be unaware of what the rest was doing; it was a small compact body of (at the most) twenty or thirty men. That is the number stated by the prosecution, and there is always exaggeration in these matters. The gun was carried by Tureeboollah, who was the leader; and all would see and know that he carried it. They would, therefore, perfectly understand that the deadly use of the arm was among the probabilities of which they took the risk;

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1878 in other words, that the commission of murder was likely to follow.

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JACKSON, J. I agree with Mr. Justice MACLEAN that, in such a case, to suffer the guilty persons to escape with slight punishment, by refusing to give the law its obvious meaning, would lead to mischievous consequences. In my opinion, therefore, the conviction was right, and the sentence perfectly proper, and, indeed, necessary.

[CRIMINAL REVISIONAL JURISDICTION.]

April 30th. IN THE MATTER OF TROILOKHΘ NATH BISWAS } PETITIONERS.
AND ANOTHER }
No 543 of
1877. *Judicial Proceeding—Investigation—Inquiry—Unnatural Death—Magistrate—Code of Criminal Procedure, sec. 135—Act X. of 1872, sec. 135.*

When, under the provisions of the Code of Criminal Procedure, section 135, a Joint Magistrate has held an inquiry and made a report to the Magistrate of the District, the High Court has no power to send for that report, as it forms no part of a judicial proceeding.

THIS is a case referred by the Sessions Judge of Nuddea to the High Court as a Court of Revision. The facts are thus stated in the Judge's letter:—

"Under section 296 of Act X. of 1872, and Circular Order of the High Court, dated the 15th of July 1863, No. 18, I have the honor to transmit the record of the case of the *Empress vs. Troilokhonath Biswas*, to be laid before the High Court with the following reports:—

"One Ramgoti Biswas, on or about the 9th of June last, was found dead in a pond near the Lokenathpore Indigo Factory. Mr. Skrine, the Joint Magistrate of Chooadanga, held an inquiry into the matter, the result being that he discharged the persons whom he had ordered to be arrested, as he considered that deceased had committed suicide. Subsequently, the Magistrate of the district, Mr. Stevens, directed that Troilokhonath Biswas and Ramgoti Kahar, who had been examined by Mr. Skrine, should be prosecuted for giving false information to that officer. They were tried by Mr. Taylor, Joint Magistrate of

Nuddea, and sentenced, under section 182, to three months' rigorous imprisonment each. They appealed to this Court; and, when the cause came on for hearing, the Government Vakeel informed the Court that he had been instructed by the Magistrate of the district to say that he was unable to support the conviction, upon which I acquitted and discharged the prisoners.

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"Shortly after this order had been passed, the prisoners' counsel, Mr. Munmohun Ghose, presented a petition on their behalf, praying that the record of the inquiry held by Mr. Skrine might be sent for and examined by this Court, on the ground that that officer's proceedings had been highly irregular; that the real cause of Ramgoti's death had not been ascertained; and that a further inquiry was urgently called for. A somewhat similar petition was presented on behalf of Ram Charan Biswas, the brother of the deceased.

"On the 4th of March, I directed the Magistrate of the district to send up the record. Not receiving it, I sent for it again on the 7th, when I was told the Magistrate was absent. On the 9th, I sent again, and, on the same day, I received a letter from the Magistrate, dated the 9th instant, copy of which I enclose, in which he declines to send the record on the ground that Mr. Skrine only held an inquest, that an inquest is not a judicial proceeding, and that, therefore, this Court has no authority, under section 295 of the Criminal Procedure Code, to call for and examine the record.

"It appears to me that the Magistrate is entirely wrong when he says that an inquiry under section 135 of the Criminal Procedure Code is not a judicial proceeding. That section empowers a Magistrate to hold an inquiry into the case of any unnatural death, and it provides that, when he holds such an inquiry, he 'shall record the evidence taken upon it in any of the manners hereinafter prescribed.' Section 4 of the Criminal Procedure Code defines a judicial proceeding to be any proceeding in the course of which evidence is or may be taken, and this, by itself, appears to me to show that an inquiry by a Magistrate under section 135 is a judicial proceeding. The use of the word inquiry, too, appears to me to point to the same conclusion, and to mean judicial inquiry into a case which a Magistrate could

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not finally decide himself, the word being expressly distinguished by section 4 from an investigation, which is defined to be the proceedings of the police, and consequently executive, and not judicial.

"But apart from the general question whether every inquiry by a Magistrate under section 135 is a judicial proceeding, there can, I think, be no doubt that, in this particular case, Mr. Skrine's inquiry was a judicial proceeding. Mr. Skrine was examined by commission in the case instituted against Troilokhonath Biswas and Ramgoti Kahar; and in his evidence he states that, in consequence of statements made by them, he arrested the entire staff of the Lokenathpore Factory, with the exception of Mr. Glasscott and the Naib; and, in answer to a question subsequently put, he says that he released them on different dates, according as they succeeded in proving their innocence. Now, here we have a Magistrate holding an inquiry into an unnatural death, arresting persons suspected of having caused the death of the deceased, taking down their statements, examining witnesses on their behalf, and eventually releasing the persons who had been arrested; and if an inquiry of this nature conducted by a Magistrate is not a judicial proceeding, I am at a loss to know what it is to be called.

"It is said that Mr. Skrine did not examine the witnesses on oath or solemn affirmation. Without seeing the record I am unable to say whether he did so or not, as he does not appear to have been questioned on this point; but, if he did not, his having failed to comply with the provisions of the law laid down in sections 139 and 331 and the following sections does not alter the nature of his inquiry, and make it something different from a judicial proceeding. Neither does his having conducted the inquiry elsewhere than in his usual cutcherry have that effect. In reply to a question, Mr. Skrine in his evidence says he did not examine anybody in open Court, the inquiry not being judicial; but section 187 of the Criminal Procedure Code says that any place in which a Magistrate holds his Court 'for the purpose of conducting an inquiry into a case triable by a Court of Session'—evidently meaning such a case as the present—

shall be deemed an open Court; and if, Mr. Skrine sat under a tree or in a ryot's house, and conducted the inquiry, such place was, for the time being, just as much a Court as the ordinary cutcherry would have been, and it is immaterial what Mr. Skrine may think proper to call it.

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"If objections such as I have noticed were to be allowed to prevail, it appears to me that a Magistrate might, by contravening the provisions of the law, oust the Sessions Court of the jurisdiction given to it by section 295, and thus practise with impunity the very irregularities which that section was framed to counteract. Here is a man said to have been murdered: the Magistrate conducts an inquiry to ascertain whether he has been murdered, and, if so, by whom; arrests a number of persons who are suspected; keeps them under arrest; hears their defence; takes evidence on their behalf, and then releases them, saying the deceased had committed suicide; and when the relations of the deceased man come in and complain to this Court that there has been no proper inquiry at all, and that there has been a gross failure of justice, an attempt is made to stop further inquiry, so far as this Court is concerned, by an allegation that the proceedings taken were only executive, and that this Court has no jurisdiction to look into them.

"It is quite possible that Mr. Skrine's report may have been everything that could be desired, and that further inquiry is uncalled for; but, without seeing his report, it is impossible for me to say whether this is the case, and I think the executive authorities are very ill-advised in refusing to make public the result of Mr. Skrine's inquiry, and thus investing it with a kind of mysterious importance which it very probably does not deserve.

"The Magistrate of the district says he is ready to furnish me with the statements supplied to him by Mr. Skrine, by which, I presume, he means the depositions taken by him; but they would not enable me to form any opinion as to the legality of his orders or the regularity of his proceedings. There seems to be an objection to calling the depositions by their right name, lest doing so should favour the contention that the inquiry was a

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judicial proceeding; but that the Magistrate did consider them formal legal depositions taken by a Magistrate in his judicial capacity, may, I think, be inferred from the fact of his having instructed the Government Pleader not to support the conviction of Troilokhonath and Ramgoti, on the ground that those depositions had not been put in evidence.

“Mr. Stevens says that he cannot supply me with Mr. Skrine’s report without the orders of Government; and that, if the petitioner, Ram Charan Biswas, applies to him for a copy, he will submit the application for the orders of Government; but I consider that this is a procedure which this Court is not called on to adopt, and that, when it has a right to order a subordinate Court to send up a record, it should enforce that right without asking the permission of any one. The document, though it is called a report, is, in fact, Mr. Skrine’s decision of the case, so far as he had authority to decide it, on the evidence recorded by him.

“The question, then, which I ask the High Court to decide is, whether the inquiry held by Mr. Skrine into the death of Ramgoti Biswas was a judicial proceeding; and whether the Magistrate of the district is bound, under section 295 of the Code of Criminal Procedure, to send up the record of the case to this Court when desired to do so. If the High Court are of opinion that it is a judicial proceeding, and that the Magistrate is so bound, I request that they will compel the production of the record called for, to enable this Court to satisfy itself of the regularity of the Magistrate’s proceedings as provided by section 295, or to call for the record and dispose of the whole case themselves, as shall seem most advisable to the Honourable Court. The four petitions presented to this Court by Troilokhonath Biswas, Ramgoti Kahar, and Ram Charan Biswas, accompany this reference.”

The High Court sent for the record of the proceedings in the Court of the Sessions Judge, and issued a rule calling upon the Magistrate to show cause why an order should not issue directing the production of the report.

Paul (Advocate-General) showed cause.

M. M. Ghose supported the rule,

The matter having been argued, the following judgments were delivered by the Court (1):—

MARKBY, J. :—

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The short facts of this case, so far as it is necessary to state them for the purpose of disposing of the present rule, are that, on the 10th of June 1877, a man named Ramgoti Biswas was found lying dead at no great distance from the factory of Lokenathpore. Under the circumstances in which he was found, I think that there was no possibility of doubt, or, at any rate, there was very good reason to suppose that the man had either committed suicide, or had been murdered. It was, therefore, a proper case for the institution of an inquiry under section 135 of the Code of Criminal Procedure; and, accordingly, as we must take it now, the Magistrate of the Division proceeded to hold this inquiry. These proceedings lasted a considerable time, and, ultimately, they were communicated to the Magistrate of the district. The final conclusion to which the Magistrate who held this inquiry came was, that the man had committed suicide, and that he had purposely committed suicide under such circumstances as might raise a suspicion that the factory-people, or some persons connected with the factory, had caused his death. Subsequently, some proceedings which arose out of this inquiry were taken against one of the petitioners now before us; and those proceedings went on appeal before the Sessions Judge of Nuddea. The Sessions Judge of Nuddea acquitted the petitioner, but he desired to see the proceedings taken under section 135, and he, accordingly, sent for those proceedings; but the Magistrate of the district, in whose hands they were, at that time, thinking that the proceedings under section 135 were not judicial proceedings at all, declined to send them. The Sessions Judge of Nuddea reported the matter to this Court, and this Court, after having heard the Legal Remembrancer on the subject, came to the conclusion that the proceedings taken by Mr. Skrine, the Magistrate, who held the inquiry, were proceedings under section 135, and that they were judicial proceedings. The Judges did not, however, order the proceedings to be sent to the

(1) MARKBY, and PRINSEP, JJ.

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Sessions Judge of Nuddea, but sent for those proceedings themselves, and an order was issued that the record of the proceedings under section 135 should be sent up to this Court. The Magistrate of Nuddea, in answer to that order, sent up certain papers; but he intimated at the same time that he was in possession of a report by Mr. Skrine, and he informed this Court that he did not send that report as that was written by Mr. Skrine as a confidential report to him.

In that stage of the proceedings, the case was transferred from the Bench which issued the original order to this Bench; and, as the matter then stood, the only point for our consideration was, whether or no the Magistrate of Nuddea was right in the view which he took, viz., that the report of Mr. Skrine did not form part of the proceedings under section 135. In the meantime, however, before we come to any conclusion upon that, the present application was made, specially requesting that we should send for this report, and that, after obtaining that report, we should quash it.

Now a good many questions would have to be considered before granting such an application. There may be some doubt whether Troilokhonath Biswas (the only one of the petitioners who had ever been put upon his trial) having been acquitted, the petitioners had any *locus standi* at all. There may be considerable doubt, even putting all other questions out of the way, whether this Court would, at the instance of persons standing in the position of the petitioners, quash a finding under section 135; and there is still a further objection, taken by the Advocate-General, which is really not answered, viz., that as the inquiry under that section is optional, this Court has no power to order fresh proceedings to be taken; and there is, therefore, but little use in our interfering at all. But it is not necessary to go into these questions, for, on another ground, I think that this application must fail.

The reason why, notwithstanding these objections, we thought it desirable without further considering them that this rule should issue, was this: It was absolutely necessary for us, in the way the case came before us, to consider whether the Magistrate of Nuddea had duly complied with the order of this

Court. The proceedings having been sent for, the report was not sent; and I understand, in the course taken by Mr. Stevens, that he wished to have it submitted, to the decision of this Court, whether or no he was bound to send up that report. I may say in passing that the course so taken by Mr. Stevens shows that he acted with perfect propriety in the matter. But it was necessary to decide the question which he submitted to us quite independently of the present application.

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For my own part, also, I strongly desired to have the assistance of the advisers of the Crown in a discussion of this character. The question is of considerable importance, and one which may, in some cases, be of a very serious consequence, namely, whether the result of an inquiry under this 135th section is such, that, without the possibility of using any discretion in the matter, the Magistrate is bound to make it public. I, therefore, thought it desirable to issue a rule, in order to bring in the Crown, and have the question discussed. Accordingly, we issued a rule, in order to have the benefit of the argument of Counsel for the Crown upon the construction of this section.

The matter has now been argued, and we have to determine what is the true construction of this section. But, before I enter into that question, I wish to say one word as to what I understand to be the object of the petitioners in this case. I may say at once that, if there was the slightest indication that there was any intention of opening up a charge against any individual whatsoever by these proceedings, I would not have been a party for a single moment to any discussion in the matter. I would not, by issuing a rule, have given the least semblance of encouragement to such proceedings. But I fully understood Mr. Ghose from the first to represent, as he has also represented now, that that is not the object of these proceedings. I understand the real object of these proceedings to be to clear the memory of the deceased man from an imputation which has undoubtedly been cast upon him; whether we can arrive at that result under the law as it stands, is a different matter; but I am bound to say that I consider the object, if it can be attained by law, is a perfectly legitimate object. No one can doubt that it must be a matter of great pain to persons connected with this unfortunate

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man, that this statement, viz., that he had committed suicide under such circumstances as the Magistrate supposes, should have been made. It may, no doubt, sometimes be the duty of public officers to make statements which are painful to others; but there is nothing objectionable, if persons affected by those statements try, by any legal means in their power, to get rid of those statements; and I go one step further—I think that the relatives of this deceased person were not rash in their inference when they found a document of this kind printed and published; that it was intended to be put forth as the judicial result of a judicial inquiry. It commences thus: “From F. H. Skrine, Esq., Officiating Joint Magistrate on special duty, to the Magistrate of Nuddea. I have the honour to submit a report embodying the results of my inquiry into the cause of the death of Ramgoti Biswas,” and so on. Reasonably enough the way in which it struck them was, that this was not merely an opinion of an individual, formed upon the best materials that he could get together by any means in his power, and reported confidentially to his superior officer, but that it was an opinion of a judicial officer formed upon evidence, and in a judicial manner. Although they were misled in supposing that it was a document of this nature, I think that they were very reasonably justified in assuming that it was so, I may also say, that if this document had been of that character, and one, therefore, under our control, I should not have hesitated for a moment, if the law would allow me, in setting it aside. I think that it is of the utmost importance to keep a clear distinction between judicial and executive proceedings; and, if this report were before me as a judicial proceeding, I should feel bound to say that it was a very unsatisfactory one. I think that it is impossible to read this document, without seeing that this is not the result of an inquiry by Mr. Skrine himself, but of Mr. Skrine, assisted by a variety of persons of inferior position; that might be a most useful thing for an ulterior object, but would not be an inquiry which ought to go forth to the world as a judicial proceeding by a Magistrate. I think it, therefore, right to say that, if this had been a judicial proceeding, I should have treated it very differently from what I am now doing; and I hope, if it be once understood that this

is not a judicial proceeding, that it will be deprived of very much of its injurious effect.

Now, with regard to what is the more immediate subject for us now to consider, I am free to admit that, during the course of the argument, I have had some doubt as to what the intention of the Legislature was when, introducing this section. I think it may be fairly argued that, *prima facie*, when a Magistrate holds a judicial inquiry, and has power to take evidence, we should expect that it was intended that some result should be arrived at. But, though that is so at first sight, I think, on further consideration, it is by no means clear—even upon a general view of the Act, independently of the exact language of the section itself—that that was the intention of the Legislature. The object of their inquiries may be three-fold. The object may be to calm any alarm that had been created in the mind of the public, on the occurrence of a violent or unnatural death, and to allay any unfounded suspicion; or the object may be to put in force the law against a particular individual; or it may be merely to gain information to be used by the authorities according to their discretion. Now, looking at the general character of this section and the sections which precede it, I cannot myself see that, merely for the purpose of putting the law in force against any particular individual, there was any necessity for this section at all. As far as I can see the powers of a Magistrate under the law, if he suspects any person of having committed any particular offence, are ample without having any recourse to this section; therefore, the inquiry, or inquest as it is sometimes called, must be to inform either the officers of Government or the public at large as to what has really occurred or is suspected to have occurred. Now, I am by no means prepared to say that, as a matter of policy, more would be gained than lost by the publication of the result of the inquiry. We may, no doubt, imagine cases in which it is very desirable that the result should be published; but we may also imagine cases in which it would be most injurious, even to private individuals, if the result were published. I only say this to show that I approach the consideration of the language of this section without being able to discern any strong reasons of

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policy in favour of either one construction or the other; and, therefore, though we may look to the policy of an Act as one of our guides in its construction, there is really nothing here to indicate what that policy is. The language of the section is this: "The nearest Magistrate, duly authorized, may hold an inquiry into the cause of any such death, either instead of or in addition to the investigation held by the Police Officer; and, if he does so, he shall have all the powers in conducting it, which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an inquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed, according to the circumstances of the case." Now, Mr. Ghose argued that the language of the section at once pointed to the provisions of section 133, and that the inquiry held by the Magistrate was to be either supplemental to, or, if he thought proper, substituted for, the inquiry held by a Police Officer, under section 133; and he quite rightly indicated to us that, under section 133, a report is required; for that section says, "that the Police Officer shall make an investigation and report the apparent cause of death," and so on. That argument, which struck me at first, seems to me to fail, because, whilst the Police Officer necessarily has some superior to whom he can report, it is by no means always so with the Magistrate. The Magistrate of the District, holding an inquiry under section 135, has, under the Code of Criminal Procedure, no executive superior to whom he can report at all. It is not impossible for him to report to the Judge, or to the Commissioner, or to Government; but I may say that it would be entirely out of the ordinary course of proceedings in this country, if he were judicially, and not executively, to make a report either to one or the other. At any rate, I feel sure that, if it had been intended that the Magistrate should report, judicially, either to the Sessions Judge, or to the Commissioner, or to Government, this would have been stated expressly in the Act.

Then, Mr. Ghose says, that, although the Magistrate is not bound to report, he must come to a finding. That, also, clearly was not the intention of the Legislature; because, under

section 133, although there is to be a report to the Magistrate, which is clearly not a finding, there is no person ordered to come to any finding at all. I can see nothing which gives any support to the argument, that, if there is not to be a report, there must still be a finding as distinguished from a report. The language of the section does not require a report, nor does it require a finding; and it seems to me that, if we were to say that under this section the Magistrate who holds an inquiry is bound to make a report or come to a finding, we should be making an unjustifiable addition to the language of the Legislature.

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Some comparison has been made, between a Coroner's inquiry and the inquiry under section 135. As far as I can see, the only semblance of any basis for that comparison arises out of the word "inquest," which is used, not in section 135, but in the earlier sections, where the Legislature apportions the various duties of Magistrates. I think that we ought not to introduce an analogy which does not really exist. The proceedings of a Coroner are, in their nature, regular criminal proceedings, having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. I think also, I am speaking correctly when I say that, even in some cases where no particular person was affected, still the result of the verdict of a Coroner's Jury might be to affect a forfeiture of property to the Crown. No doubt, some of these results do not exist now, and have fallen into disuse; but we must, I think, remember what the Coroner's Inquest originally was, when we are asked to consider why it results in a finding.

On the whole, therefore, I think that this rule ought to be discharged, upon the ground that the report sent up by Mr. Skrine to the Magistrate of Nuddea was not part of a judicial proceeding.

PRINSEP, J.:—

PRINSEP, J.

I altogether agree in the view of the law in section 135 of the Code of Criminal Procedure, which has just been laid down by Mr. Justice MARKBY; and in holding that the report sub-

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mitted by Mr. Skrine, the Magistrate of the Division of Chooa-danga, to the District Magistrate, Mr. Stevens, is no part of any judicial proceedings held under that section. It seems to me quite clear that the form of an inquiry under section 135 is directed more to elucidate the facts of a violent or unnatural death, before there is any reasonable suspicion of the commission of any offence; and that, when such grounds do exist, the inquiry comes under another portion of the Code.

As regards the form in which the present application is made to us, I must say that I have always entertained serious doubts as to the *locus standi* of the petitioners, and it was, as has already been stated in the judgment which has been just delivered, on account of the importance of deciding the position of the Magistrate, with regard to this particular report and the proceedings taken by him, that led me to agree in the course taken.

Whatever grounds the relations of the deceased may have to complain of the terms of the report, in the form in which they produce it before us, and the aspersions that it may cast on the memory of the deceased Ramgoti Biswas, I think that the observations of the learned Advocate-General, in the course of his argument, completely dispose of any objection that they may take to the terms in which that report mentions Ramgoti. That report was never published until, through some injudicious agitations of the friends or advisers of the petitioners, a pressure was brought to bear on the Government, which induced the latter to consent to the publication of that report in the expurgated form in which it has been laid before us. Had this course not been taken on behalf of the petitioners, that report would never have been published or been made known, except to the officials immediately concerned. We have no power to quash that report, as we are asked to do; nor has it been suggested that any good result would ensue in the ends of justice, by any re-opening of the inquiry; since it is admitted, that nothing is forthcoming or likely to be elicited which would throw any fresh light on the circumstances attending the death of Ramgoti Biswas. •

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF UMDA KHANUM AND OTHERS.

1878
May 27th.*Section 491, Code of Criminal Procedure—Security to keep the peace—Evidence to be recorded.*

A Magistrate is not competent to require persons to give security to keep the peace until he has adjudicated on evidence taken in their presence, that they have by their conduct rendered this necessary.

Rajah Run Bahadoor Singh vs. Rane Tilessuree Kooer, 22 W. R., Crim., 79, cited and followed.

APPLICATION to the High Court, as a Court of Revision, to set aside, as contrary to law, the order of the Joint Magistrate of Nowada, requiring Umda Khanum, a *purdah* lady, to give security to keep the peace.

The Joint Magistrate tried certain persons on a charge of riot and severe assault, but having "grave doubts as to their guilt" discharged them; but, at the same time, and without taking any evidence, required one of those persons as well as the witness of the complainant and others who appeared for the complainant to give security to keep the peace.

• Mr. C. Gregory for Petitioner.

The following order was passed by the High Court (1):—

The Joint Magistrate of Nowada, who has required the petitioner, a *purdah* lady, and others, to furnish security to keep the peace, admits that he has passed this order without the special recording of evidence, as he considers that the law only requires that a Magistrate shall decide on sworn testimony sufficient to convince him of the necessity of the proposed procedure, and he proceeds to state that in another case he "had abundance of such evidence," and that "being in camp for six days in the village, I can speak to the bitter exasperation of the parties."

The terms of the law are clear against the Joint Magistrate. A Magistrate must have a report or information which appears

(1) MARKBY AND PRINSEP, 77.

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to be credible, and which he believes, before he can issue a summons, calling on any person to show cause why he should not be bound over to keep the peace; but he cannot bind over a person until he has adjudicated on evidence before him, that is, upon evidence taken in the regular way in the presence of the person who is to be bound over that person. (Explanation I, section 491.) That evidence may be the submission of the person summoned to the terms and conditions of the summons; or, should he not so submit, evidence establishing that a breach of the peace is likely to take place in consequence of the unlawful conduct of such person.

If, however, any person has been convicted of an offence attended with violence, of the nature specified in section 459, the Magistrate is competent, in addition to the sentence or order passed, to direct that the person so convicted shall give security. In such a case, too, the Magistrate has adjudicated on evidence before him (that is, the person concerned) that facts are established requiring security, because he has convicted such person of a breach of the peace or an intention to commit a breach of the peace. In the case, however, on which the Magistrate relies as an alternative, should his view of the law be erroneous, only one of those now bound over were accused, and he is not the petitioner. Further, the Magistrate distinctly acquitted in that case, so that that evidence is not admissible, even against Gujadhur Lall.

We commend the Joint Magistrate's attention to the judgment of the Court, reported in 22 W. R., Crim., 79—*Rajah Run Bahadur Singh vs. Ranee Tilessurree Koor*, in which we generally agree and which is in point. Security to keep the peace having been taken by the Magistrate without adjudicating on evidence recorded before these persons, we cancel that order, not only as regards Umda Khanum, but as regards all those concerned in that proceeding.

[CRIMINAL APPELLATE JURISDICTION.]

ABDOOL KURREEM	APPELLANT ;	1878
AND.		July 19th.
THE EMPRESS OF INDIA	RESPONDENT.	No. 379 of 1878.

Abetment—Conspiracy—Bigamy—Penal Code, sections 109, 495.

The elder paternal uncle of a Mahomedan girl, a minor, disposed of her in marriage, after he knew she had previously been given in lawful marriage by his younger brother. *Held*, that the act did not, *per se*, constitute a criminal offence, even though the second marriage were valid, it appearing that the accused, was the only person concerned in the second marriage who knew of the first, and that the girl was not present.

A and B were indicted under sections 109 and 495 of the Penal Code—A for giving his niece (a minor) in marriage, she being then married, and B for aiding therein. The girl was not present at the marriage, and there was no evidence to show A had conspired with any person but B, whom the jury acquitted : *Held*, that the acquittal of B involved the acquittal of A.

CRIMINAL APPEAL from a finding and sentence passed on the appellant under sections 109 and 495 of the Code of Criminal Procedure.

Wood, for the Appellant (Moonshee *Serajul Islam*, with him).

The facts of the case are sufficiently set forth in the following judgments which were delivered by the High Court (1) :—

WHITE, J. :—

WHITE, J.

The prisoner has been convicted under section 494, coupled with section 109, of abetting the offence of bigamy. This word is not used in the 494th section, but it briefly describes the offence contemplated by that section. The charge of abetment is preferred against the prisoner, jointly with his brother Abdoos Soban, but the latter has been acquitted.

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WHITE, J.

It appears that one Abdool Rohim died a short time ago, leaving a widow and an only daughter, an infant, named Hoorunnessa. The prisoner is the elder brother of Abdoos Soban, and the two are the paternal uncles of Hoorunnessa, and as such are, by Mahomedan law, her guardians in marriage during her minority.

According to the prosecution, Hoorunnessa, who is about six years old, has, since her father's death, been the subject of three marriage ceremonies, which took place within a short interval of time between each. First, the mother of the girl disposed of her in marriage to one Abdool Hossein, a boy about 12 years old. This marriage is admitted by the prosecution to be invalid, inasmuch as the mother was not the guardian of the child for the purpose of marrying her. A second ceremony is alleged to have subsequently taken place, in which Abdoos Soban, the younger paternal uncle of the girl, in the absence of the prisoner, Abdool Kurreem, gave her in marriage to the same Abdool Hossein. By means of this second ceremony, although solemnized by the younger uncle alone, a valid marriage was, according to the prosecution, made between Abdool Hossein and the girl. Afterwards, a third ceremony took place in which the prisoner Abdool Kurreem, the elder paternal uncle, gave the child in marriage to one Daburuddin, a boy nine years' old. It is in respect of this third ceremony that the charge of abetment of bigamy was preferred against both the uncles. The prosecution alleged that both of them were present at the third ceremony—Abdool Kurreem as the principal actor and Abdoos Soban as a consenting party; and that when the third ceremony was performed, Abdool Kurreem was aware that the second ceremony had been performed; and that Abdoos Soban, as being the principal actor in the second ceremony, had necessarily a similar knowledge.

The defence of Abdoos Soban was, that he took no part either in the second or third ceremony, nor was present at either. The defence of the prisoner Abdool Kurreem was, that he knew nothing about the alleged performance of the second ceremony, and that he was merely exercising his lawful rights as guardian in giving the child in marriage to Daburuddin. The Sessions

Court and the Assessors have found as regards Abdoos Soban that he was present at, and did take part in, the second ceremony, and that the second ceremony constituted a valid marriage, but that he was not present at the third ceremony, nor party to the same, and accordingly have acquitted him. As regards the prisoner Abdool Kurreem, they find that he gave away the child at the third ceremony; that it was a void proceeding in consequence of the previous second ceremony; and that the prisoner was, at the time of the third ceremony, aware that the second ceremony had been performed, and they accordingly convicted the prisoner, and he was sentenced to 18 months' rigorous imprisonment.

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The prisoner before us has appealed against the finding of the Sessions Court on the facts, and also against its conclusions in law. It appears to me unnecessary to enter into the merits of the appeal: for taking the facts as found by the Court to be true, and the law applied by it to be correct, I am of opinion that this conviction cannot be sustained.

The prisoner is charged with the abetment of an offence under section 404 of the Penal Code. To establish a charge of abetment under the Penal Code, the accused must be proved either to have instigated or aided some other person to commit the offence, or to have engaged with another in a conspiracy for the commission of the offence. The acquittal of Abdoos Soban, who was jointly charged with the prisoner, puts an end to the case of conspiracy; for, except with Abdoos Soban, there is no evidence to support a case of conspiracy. If, therefore, the conviction can be upheld, it must be in consequence of the prisoner having instigated or aided Hoorunnessa to contract a second marriage. The evidence shows that Hoorunnessa took no part in, nor was present at, the ceremony which the prisoner caused to be performed in her name, and there is not only no proof of instigation or aiding, but not even the slightest evidence that Hoorunnessa was consulted, or even communicated with by the prisoner before the ceremony took place. In fact, the nature of the transaction almost precludes the notion of abetment as far as the infant girl is concerned. The prisoner purported to dispose of her in marriage, not by virtue of any authority

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derived from her, or from any consultation of her wishes, but by virtue of his legal position as elder paternal uncle. The girl was a mere cypher in the transaction. Her name was used, the ceremony was on her behalf, and the prisoner symbolically gave her in marriage to Daburuddin, but the girl was personally a stranger to the whole proceeding; although the effect of the ceremony would have been, supposing the prisoner was acting within the authority given him by law, to bind the infant by the marriage so contracted, yet she was not the less personally a stranger to both the ceremony and the contract.

It appears to me, therefore, that, without determining any of the questions of fact or law raised by the prisoner's appeal, the conviction must be set aside on the ground that the prosecution has failed to show that the prisoner is guilty of the offence of abetment within the meaning of the Penal Code. Assuming the facts and law to be as found and laid down by the Sessions Court, the prisoner has committed an illegal act in disposing of his infant ward in marriage after he knew that she had been previously lawfully disposed of in marriage by her younger paternal uncle, but in doing this act he was, according to the evidence, the sole actor, and the act, though illegal, is not, if done by one person alone, an offence provided for by the Penal Code.

In disposing of this case, I would observe that it ought not to have been made the subject of a criminal prosecution. A dispute has evidently arisen between the relatives of this little girl, who appears to be entitled to some property, as to which of them should dispose of her in marriage. The several questions which the dispute has given rise to, *viz.*, what marriage ceremonies have been performed on the girl's behalf, and by whom, and what is their legal effect, are eminently questions to be submitted to a civil tribunal, if the parties disagree about the same; and it is much to be deprecated that one of the rival parties should endeavour to procure a decision on these points through the medium of a criminal trial. The inconvenience and hardship to the accused of making such a dispute the subject of a criminal prosecution is well illustrated by the present case. The first marriage, which the mother solemnized, is admitted by the prosecution to be wholly invalid. To show that the third marriage

solemnized by the prisoner was invalid, it is essential for the prosecution to establish that an intermediate ceremony took place in which Abdoos Soban disposed of the girl in marriage, and that that intermediate ceremony constituted a valid marriage according to Mahomedan law. Although the evidence of Abdoos Soban is of the utmost importance on this question, the prosecution has chosen to put him on his trial jointly with the prisoner, and so prevented him from being called as a witness. Abdoos Soban denies that he did solemnize the second marriage, and this cardinal point has been determined by the Criminal Court without hearing his testimony.

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Another objection to the course adopted in the present case is, that the criminal trial will not be a bar to the taking of civil proceedings at some future time in order to ascertain to which of the two boys the girl was legally married; and, should such proceedings take place, the conviction of the prisoner in the criminal trial will be no evidence against him in the civil proceedings. The whole matter will have to be re-investigated upon such evidence as the parties may adduce, and it is possible that the Civil Court may arrive at a conclusion different from that of the Criminal Court, and uphold the marriage, for contracting which the prisoner has been found guilty. The conviction and sentence will be set aside and the prisoner released.

PRINSEP, J. :—

PRINSEP, J.

I altogether agree with my learned colleague that in this case it is not necessary to come to any finding upon the facts, and that, accepting the facts as stated by the prosecution, the appellant cannot be convicted of the abetment of bigamy under sections 109 and 494 of the Indian Penal Code.

The girl Hoorunnessa, who forms the subject of this case, is aged about six years, and apparently is possessed of considerable property, which fully accounts for the strife which is going on for her person and for procuring her marriage into one or other of the two families. She was married first to Abdool Hossein, with the consent of her mother; but this was not a proper consent such as would render the marriage valid. She was afterwards, according to the prosecution, again married to the

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same boy, Abdool Hossein, with the consent of Abdoos Soban, her younger paternal uncle, that is, one of her two guardians. Then the prosecution goes on to say that she has been married for the third time (so as to cause bigamy) with the consent and at the instigation of the appellant, Abdool Kurreem, the elder uncle, to another boy. Now, the first marriage is admittedly void; and, if the facts are as stated by the prosecution, the third marriage would also be void as being a bigamous marriage. But however that may be, as has been forcibly pointed out, this matter should be decided and can only be properly decided in the Civil Court. Even if the appellant, Abdool Kurreem, did procure that marriage, he cannot, on the facts stated by the prosecution, be rightly convicted of the abetment of bigamy. It does not appear, nor is it stated, that the girl was present or even cognizant that this marriage was to be contracted on her behalf. The offence of abetment and its definition is to be found in section 107 of the Indian Penal Code, and that section is supplemented by a definition of the term "abettor" in section 108; but both these sections contemplate either the instigation or the aiding of some person to commit a substantive offence, or the engaging in the conspiracy on the part of a person in the position of the appellant, with one or more other persons. It has been pointed out by Mr. Justice WHITE, that there must be either a principal committing a particular act or instigating to commit that act, or there must be some other person engaged with the appellant in abetting this act, to constitute an abetment under the Indian Penal Code. But nothing of the kind is alleged by the prosecution; and therefore, even if the appellant should have committed all the acts imputed to him, he would not be guilty of any criminal offence under the Indian Penal Code. The conviction will be set aside and the prisoner released.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF ACHARJEE LALL } PETITIONERS.
AND ANOTHER }

1878
August 13.

Inquiry—Agent—Information—Dewan—Kasanchi—Code of Criminal Procedure, sections 90, 206—Offence. No 129 of 1878.

In an inquiry, such as is contemplated by section 206 of the Code of Criminal Procedure, it is necessary that the accused should have a clear statement made to him: (1) That he is about to be put upon his trial; and (2) What the offence is of which he is charged.

Quære.—Whether a *Dewan* or a *Kasanchi* is an agent within the meaning of section 90 of the Code of Criminal Procedure; and, if so, whether he is bound to give any information except in the case of a sudden or unnatural death.

MOTION on behalf of Acharjee Lall and another, that the High Court should quash a finding and sentence of the Deputy Magistrate of Sarun on the ground of illegality.

Branson and *Evans* for the Petitioners. (*Baboo Doorga Pershad* with them.)

• *Kilby* for the Prosecution.

The judgment of the High Court (1) is as follows:—

MARKBY, J.:—

MARKBY, J.

It is clear that the conviction of these two petitioners must be set aside as illegal. It is not necessary to enter into any minute consideration of the rules laid down in the Code of Criminal Procedure, because, at any rate, it was necessary, before these two persons could be convicted, that they should fully understand that they were upon their trial for an offence, and what the nature of that offence was.

Now, the contrivance by which the petitioners were brought before the Magistrate was in itself an extremely unsatisfactory proceeding, wholly unworthy of those who devised it and of

(1) MARKBY and PRINSEP, JJ.

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those who carried it out. A notice was sent to these two persons by the District Superintendent of Police, informing them that, with reference to the charge of theft of barley of one Gokul Tewari and others, it was necessary to ascertain from them certain facts, and they were therefore written to in order that they should attend at the camp of the District Superintendent of Police on the next day at 8 A.M. That notice is dated the 13th of March 1878. That was not a legal summons which the petitioners were bound to obey, but it is one which, out of good feeling and respect, would be almost universally obeyed, coming from a European officer, to persons in the position of the petitioners. The petitioners, accordingly, went next morning to the spot indicated; and the first thing that happened when they got there was, that they were put into custody. This was wholly illegal and most improper. It does not even appear that they were informed for what reason they were placed in custody.

Then certain proceedings took place which it is extremely difficult to understand. A man named Redoy was then and there actually tried and convicted of theft. But, besides that, these two petitioners were also tried and convicted for not giving information to the nearest Police Station of the offence of theft, as required by section 90 of the Criminal Procedure Code. But it is very uncertain in what order those proceedings took place. They seem to have been, to some extent, mixed up together. The probability, however, is, that in the first instance some evidence was taken against these two petitioners, but before that case was concluded, the case against Redoy was gone into, and he was convicted; and then, subsequently, more evidence was taken for or against the petitioners, and they were also convicted by the Joint Magistrate.

The proceedings appear to have taken place at the camp of the District Superintendent of Police, and not in any cutcherry. Of course, the circumstances under which this trial took place were such as to render it extremely likely that the two petitioners would not really understand what was going on. They accordingly complained, when they came in appeal before the Judge, that they did not understand the proceedings. Especially,

they complained that they received no summons; that there was no formal complaint made against them; and that they did not understand the charge upon which they had been put upon their trial.

The Judge upon that asked for an explanation from the Joint Magistrate. The Judge in his letter pointed out that, unless the Joint Magistrate had special power to proceed without complaint, the absence of the complaint in this case would be fatal to his jurisdiction. The Joint Magistrate sent his explanation to this effect. He begins by admitting that he was not empowered to entertain cases without complaint, and then he says that it cannot be said that he acted in the present case without complaint, for he acted upon a demi-official communication by the District Superintendent of Police as well as on verbal complaint of that officer. It does not seem to be clear which of these two things formed in his view the complaint upon which he proceeded, but I think it was the former. Then he goes on to say that "there were strong reasons which prevented the District Superintendent recording any public proceeding in the matter until he was in the position to have the evidence taken before a Magistrate." Then, further on he expresses an opinion that the case would have fallen through had not the prosecution been kept quiet till he arrived and recorded the evidence of the witnesses. So far from removing any doubt that arises from the statement of the petitioners, that they had not been informed what the charge against them was, that explanation seems to show almost conclusively that they were not so informed. It is nowhere asserted by the Joint Magistrate that he communicated the contents of the letter from the police officer to the accused; and it is very extraordinary that that letter does not appear upon the record. The Joint Magistrate thought it of so little importance that he did not even preserve it, and could not produce it when asked to do so.

It has been argued before us that the petitioners' own petition, when taken together with the record, shows that they were informed what the nature of the charge was. I think it is possible that the examination of the petitioners, which appears in the Joint Magistrate's record at the end of the proceedings,

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was taken before the evidence of the witnesses was recorded ; but from the perusal of that examination I think it impossible to infer that the accused were informed what the charge against them was, or that they were given thereby to understand that they were about to be put upon their trial for any particular offence. The first question that was put to the petitioner Acharjee Lall, was a question relating to the charge of theft ; and it was in reference to that, and not in reference to any charge against himself, that he had been summoned to attend. No doubt some very general questions were put to him, as to whether or no he had given any information of any theft at all ; but what then passed seems to me to be more like a scolding by the Joint Magistrate for general misconduct, than an inquiry such as is contemplated by section 206 of the Criminal Code, and such as would show a man that he was about to be put upon his trial for any particular offence. "

It was argued before us that the first document which appears on the Joint Magistrate's record was the complaint in this case, and it is headed, no doubt, "The Complaint of Seo Pershad Lall ;" but the use of the word "complaint" is merely accidental, because many of the depositions which follow are also headed in that way.

It is clear, therefore, that the word "complaint" indicates nothing. It happened to be the word used in the printed forms which were then available. It is also clear that this man was treated as a witness, because a note is made that he was not cross-examined. It is not, in fact, even suggested by the Joint Magistrate that this man was the complainant in this case. The Sessions Judge is, no doubt, right in saying that what the Joint Magistrate really acted upon was the information given him by the District Superintendent of Police.

Under these circumstances we can come to no other conclusion upon the Joint Magistrate's own explanation and what appears upon the record, than this—that these two petitioners never had any clear statement made to them that they were about to be put upon their trial, or of what the offence was which was charged against them. That is a sufficient ground for disposing of this case, and on that ground alone I should have

no hesitation in quashing the conviction.. But I also think that neither of these two persons would come within section 90 of the Code of Criminal Procedure. With regard to the person who appeared to be really a *Kazanچی*, although possibly he performs some other duties, I do not think that he would be an agent within the meaning of that section, under any circumstances, unless we extend this section to all servants of zemindars, which I certainly should not feel disposed to do. With regard to the Dewan he might be an agent within the meaning of the Act, if his master was absent; but it would be unreasonable to extend the operation of the Act to a Dewan who was acting only under the orders of his resident master. The section is exceedingly vague in its language; and, unless strictly construed, might be made the instrument of great oppression. The conviction and sentence must be set aside, and the petitioners released.

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PRINSEP, J. :—

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'I also agree in setting aside the conviction and sentence recorded by the Joint Magistrate in this case.

The object of the Code is to secure a fair trial to every person accused of a criminal charge, and it requires that in a summons case there should be ordinarily a complaint, and a summons specifying the nature of the complaint. There are certain expressions used in the Code, the object of which is to prevent certain irregularities in matters of form from interfering with the course of justice; but, in the present case, and, in fact, in all summons cases, it is absolutely necessary that a person in the presence of a Magistrate should know that he is then about to be tried, or, in the terms of section 206, that the substance of the complaint should be stated to him; and he should be asked if he has any cause to show why he should not be convicted.

Now, there is nothing in the present case to indicate that either the Dewan or the *Kazanچی*, who were in attendance to give information regarding a theft case, were informed that they were themselves under trial. The nature of the questions put to them, and the information required, would, as, has already been pointed out by Mr. Justice MARKBY, be more in the nature of finding fault with them for some want of co-operation with the

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police in that case of theft, and would not necessarily inform them that they were then upon their trial for failing in their duty to report that offence, which had not yet been proved before the Magistrate; and, therefore, they would naturally infer that before that offence was proved, no further proceedings could be taken against them. In the present case, we have the fact that the Magistrate was sitting in the camp of the District Superintendent of Police; so that these persons would not, as in an ordinary criminal case, when in a regular Court House, have notice that a trial was being held. It is not uncommon for a Magistrate to proceed to the mofussil for the purpose of holding an investigation or *tadaruck* of various matters which is never considered as a trial, so that being asked these questions by the Joint Magistrate, without any further notice, would not warn these persons that they were then under trial.

In other respects I entirely agree with the judgment delivered by Mr. Justice MARKBY, that this case has not been fairly and properly tried. As regards section 90, I think there is considerable force in the argument of Mr. Branson that, although the commencement of that section refers to an agent of an owner or occupier of land responsible for giving information to a Magistrate, when it comes to declare the nature of that information, the terms of the first three clauses seem to exclude that class referring only to the other classes. It would seem either that this was an accidental omission on the part of the Legislature, or that the Legislature expressly intended that an agent is responsible only for giving information regarding the last clause, that is, of the occurrence of any sudden or unnatural death. It is not on this ground, however, that I would set aside the conviction and sentence in this case; but I think it necessary to draw attention to the state of the law: so that if there is any accidental omission it may be rectified when the Code comes under amendment.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF HUROSOUNDERY CHOW- } PETITIONER.
DHRAIN \ }

1878
June 24th.

Section 330? Code of Criminal Procedure—Examination of witness by Commission—Appearance of Magistrate to show cause—Practice—Letter—Legal Remembrancer.

No. 105 of
1878.

Where a rule is issued, directing a Magistrate to show cause, and he wishes to do so, he should apply to the Legal Remembrancer to have an appearance entered for him in the High Court.

The fact that a Hindu lady is expected to make false statements is no ground upon which an application to take her evidence on commission should be refused.

RULE calling on the Magistrate of Mymensingh to show cause why an order directing the issue of a commission to examine one Hurosoondery Chowdhraim should be withdrawn.

Paub (Advocate-General) in support of the rule.

The judgment of the High Court (1) was delivered by

AINSLIE, J.—

AINSLIE, J.

"On the 12th of this month we made an order, directing the Magistrate to issue a commission for the examination of Hurosoondery Chowdhraim, at the same time giving him leave to show cause why the order should be withdrawn. The Magistrate has now sent up a letter addressed to the Registrar of this Court. This is not the proper form in which he ought to have shown cause. If he wished to show cause, he should have applied to the Legal Remembrancer to cause an appearance to be made for him in Court.

We might deal with this matter as if the Magistrate had not made any appearance at all; but we think it better, under the circumstances, to dispose of the rule on its merits.

The reasons assigned by the Magistrate in his letter appear to us to be wholly insufficient. It may be that this lady as well as

(1) AINSLIE and BROUGHTON, JJ.

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any other person under examination may make statements which are not wholly true; but the Magistrate can guard against that by deputing some person thoroughly instructed for the purpose of examining on any fresh matters that may arise on her answers to written interrogatories, if it is necessary in this case to issue written interrogatories at all. At any rate we cannot assume beforehand that the witness will make false statements.

There is in the letter of the Magistrate some indication that an attempt was to be made to make the witness criminate herself by her answers. This ought not to be done, and is a further reason for directing that she should be examined by commission in order that the answers which she may give may be carefully weighed by her, and not given without full consideration. The rule is made absolute.

[CRIMINAL REVISIONAL JURISDICTION.]

July 22nd. IN THE MATTER OF JUGGODESHARY CHOW- } PETITIONER.
DHRAIN }

Actual possession—Possession of Agent—Wife's possession—Code of Criminal Procedure, secs. 530, 531.

In an inquiry under section 530 of the Code of Criminal Procedure, the only thing to be determined is the fact of actual possession.

In a dispute between the wife of a lunatic and the manager of his estate, with regard to the possession of certain property, the Magistrate attached the property under section 531 of the Code of Criminal Procedure, on the ground that he was unable to satisfy himself as to who was in possession. It had been proved before him that the wife was in actual possession, but there was a doubt as to whether she was not in possession merely as the agent of her husband. *Held*, that section 530 has only to do with actual possession; and that the Magistrate should have decided that the wife was in possession.

CRIMINAL REFERENCE from the Judge of Backergunge.

Paul (Advocate-General) for the Petitioner. Baboo *Bhoobun Mohun Dass* with him.

Allen for the Opposite Party. Baboo *Bussunt Coomar Bose* with him.

The following judgments were delivered by the High Court (1):—

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WHITE, J. :—

Judgment.
WHITE, J.

The Magistrate has passed an order in this case under section 531 of the Criminal Procedure Code, deciding that none of the parties before him were in possession of a certain mehal; and accordingly directing it to be attached. The parties before him were the manager on behalf of Mothooranath Roy (who is a lunatic, and the management of whose property is vested in the Court of Wards), and Juggodeshary Chowdhraim, the wife of the lunatic.

It appears from the judgment of the Magistrate that, when this application was made to him in March last, Juggodeshary Chowdhraim was in possession of the mehal. What was doubtful was whether that possession was on her own behalf or for her lunatic husband. It also appears from the judgment that the mehal had been purchased in her name, but managed by the husband up to the time of his coming under the Court of Wards, and that Juggodeshary was certainly, for a month or two previous to the application, collecting the rents and doing so under a claim of right on her behalf. With these facts before him, we think that the Magistrate ought not to have decided that none of the parties was in possession; and that he has committed a material error in doing so. Whether Juggodeshary's claim to hold the mehal for herself is a good one or not, must be determined by a suit in a Civil Court. The question is really one of title, with which the Magistrate had nothing to do. It is clear upon his own finding of the facts that Juggodeshary is the party who is actually in possession. We accordingly set aside the order of the Magistrate.

PRINSEP, J. :—

PRINSEP, J.

The only question involved in this case is the question of actual possession of the subject-matter of dispute. The parties to the case were the wife of the lunatic and the estate of the lunatic

(1) WHITE and PRINSEP, JJ.

[CRIMINAL.]

C. L. R., 36.

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*In re*JUGGODESH-
ARY CHOW-

DHRAIN.

Judgment.

PRINSEP, J.

as represented by the Court of Wards. The estate was placed under the Court of Wards in September, and the Magistrate has found that from that time up to January the manager of the Court of Wards had great difficulty in collecting rents; that he collected only a small sum, about one hundred rupees; and that finally, in the course of January, he ceased to make any attempt to collect the rents. On the 23rd of March, the present case was instituted by the Magistrate under section 530. As I have already said, the sole point was to determine the fact of actual possession; and, as section 530 also states, without reference to the merits of the claims of any party to a right of possession. The finding of the Magistrate clearly indicates that the wife was in possession and remained in possession, and that whatever possession the manager may with difficulty have obtained by collection of rents from some stray ryots, it ceased in January. Therefore, it is difficult to understand how the Magistrate, having found these facts, has come to the conclusion that he was unable to find who was in possession on the 23rd of March.

As the Magistrate in his official capacity as collector was in the management of this very estate, and as the general manager under the Court of Wards was his subordinate, I agree with the remark of the Judge that the Magistrate would have shown a better discretion, if he had left the decision of this case to the Joint Magistrate.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF SHIBO PROSHAD PANDAH, PETITIONER.

June 13th.

No. 56 of
1878.

Defamation—Good faith—Onus—Indian Penal Code, section 499—Act XVIII. of 1862, section 27.

In the mofussil, if an accused person is proved to have committed what *prima facie* amounts to defamation, the *onus* is on him to show that his case comes within some one or more of the general exceptions to section 499 of the Indian Penal Code.

Semble, that if a man is tried for defamation in the Original Criminal Jurisdiction of the High Court, it will be assumed that he acted in good faith until the contrary is proved. Otherwise in the mofussil.

Act XVIII. of 1862, section 27, does not extend to the mofussil Courts. *R. vs. Kikabhāi Parbhudas*, 9 Bom. H. C. R. 451.

IN this case the petitioner moved the Court to send for the records of a case, wherein he had been convicted of defamation by the Magistrate of Cuttuck (whose judgment was affirmed by the Sessions Judge), on the ground that the conviction was illegal.

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Branson for the Petitioner. Baboo *Mohendro Lall Mitter* with him.

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Argument.

Branson.—Though this is a *mofussil* case, sections 26 and 27 of Act XVIII. of 1862 apply. They merely express what is the well-known rule of law, that proof of charges involving bad faith lies on the party making them. No doubt, it has been laid down in *R. vs. Mohunt Pursoram Doss*, 2 W. R., Crim., 36 (on review, 3 W. R., Crim., 45), that the imputation must be made in good faith, but that case is essentially different from the present. There the complainant was charged with having committed a crime and then having others accused of it; besides Act XVIII. was not referred to. The next case is *Sealy vs. Ram Narain Bose*, 4 W. R., Crim., 22, in which GLOVER, J., does say that Act XVIII. does not apply to the *mofussil*, but he also says that, even if it did, "the circumstances from which good faith might be presumed must be proved;" and this is clearly bad law.

Again, what the accused has done here did not amount to defamation—*Brojo Nath Roy vs. Kishen Lall Roy*, 5 W. R. 282; *Mohendro Nath Dutt vs. Koylash Chunder Dutt*, 6 W. R. 245. In *Greene vs. Delanney*, 14 W. R., Crim., 27, the question was one of publication. Act XVIII. was not referred to. In that case, also, evidence of want of good faith must have been given, for the Judge found the absence of good faith. In the present case the prosecution gave no evidence of malice.

On the facts of this case the accused should have been acquitted. It is clear that he believed the statements which were made to him. Neither the Magistrate nor the Sessions Judge find that he did not, and therefore the conviction cannot stand—*Lister vs. Perryman*, L. R., 5 H. L. 522.

Counsel also cited *R. vs. Kikabhai Parbhudas*, 9 Bom. H. C. R. 451, and *Chatfield vs. Comerford*, 4 Fos. and Fin. 1008.

The following judgments were delivered by the Court (1) :—

MARKBY, J. MARKBY, J. :—

The defendant in this case has been convicted and sentenced to simple imprisonment for one month by the Joint Magistrate

of Balasore, under section 500 of the Penal Code, for defamation, and he has applied to us to set aside the conviction and sentence as illegal. The defamation charged is contained in a petition to the Magistrate of Balasore, in which the defendant stated that Hur Narain Mohaputtur and others were preparing to bring false charges against him, and it was upon Hur Narain Mohaputtur's complaint, that the allegations in this petition were injurious to his character, that these proceedings were instituted.

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The defendant, at the trial, tried to prove that the allegations in the petition were true; and he called several persons who swore that they had heard conversations between Hur Narain Mohaputtur and other persons, in which Hur Narain Mohaputtur had expressed the intention of getting up false charges against the defendant, and that they had reported the conversations to the defendant.

The Joint Magistrate convicted the defendant; but he does not state clearly in his judgment, whether he disbelieved the witnesses when they state that they told the defendant these conversations took place, or only when they state that these conversations did, in fact, take place; but he finds that the defendant did not act with good faith when he filed the petition.

The Sessions Judge seems to consider that the only question is, whether the defendant acted in good faith when he presented the petition. Upon this point he considers what he calls the "English practice" more consistent with logic or the principles of Criminal Jurisprudence, but thinks that he is barred by a decision reported in 14 W. R., Crim. R., p. 27, from following the English practice. I presume that what the Judge means by the English practice is a presumption that the defendant acted *bonâ fide* until the contrary is proved. I do not think that any Judge, with a reasonable amount of common sense, and apart from any special statutory provisions, would doubt as to what course he ought to pursue in such a case.

The course taken by the defendant, if not a very immoral one, was, at least, one which is not warranted by the law. The imputation made was a very serious one; and it was made in a very public manner. When, therefore, complainant denied upon his

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own oath or by credible witnesses that the imputation was true, it would, I think, be proper to call upon the defendant to show that he had some reasonable ground for making the imputation, either by showing that the imputation was true, or that, if false, he had reasonable ground for believing it was true, looking to the source from which the information was obtained.

But the matter has been dealt with by the Legislature, and by provisions which are by no means altogether easy to comprehend. The Penal Code contains a chapter relating to what are called general exceptions, such as mistake, infancy, lunacy, intoxication, consent, the right of private defence, and so forth. Certain sections of the Code also contain exceptions, some of which modify the definition of the crime, and others modify the punishment, or show that it is not applicable.

The first Code of Criminal Procedure provided (section 235) that it should not be necessary, in a charge, to allege circumstances showing that the case did not come within any of these general exceptions; also, that it should not be necessary to allege, even generally, that the case did not come within those exceptions; but that every charge was to be understood to assume the absence of all such circumstances. By section 237, "when the section referred to in the charge contains an exception, not being one of such general exceptions, the charge shall not be understood to assume the absence of circumstances constituting such exception so contained in the section, without a distinct denial of the existence of such circumstances." These provisions, it will be observed in passing, contain rules of pleading only. Whether they would in any way affect the evidence to be adduced in support of the charge, is a question of difficulty.

Subsequently, Act XVIII. of 1862 was passed, which provides by section 26, that, "absence of circumstances, bringing the case within the general exceptions under the Penal Code, need not be alleged; but proof of their non-existence may be given by prosecutor, if accused give evidence of their existence." Section 27 provides that, "in indictments for defamation where defence is made under certain exceptions to section 499 of the Penal Code, good faith is to be presumed." These provisions, it

will be observed, apply both to pleading and evidence. Apparently, they were only intended to apply to the Supreme Courts.

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After this, Act I. of 1872, section 105, provided that, "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any other law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The former Code of Criminal Procedure, containing the provisions abovementioned, has been repealed, and the new Code of Criminal Procedure does not contain any analogous provision; but from section 439, illustration (a), it may be inferred, that the averment of the absence of all general exceptions is to be assumed, as before, without allegation, and that the averment of the absence of some other exceptions is also to be assumed; but whether this applies to all exceptions is not clearly stated. It affects, however, only the statement of the offence in the charge; and the rule of evidence must, I consider, in the Mofussil Courts, be governed entirely by Act I. of 1872, section 105.

At first sight, therefore, it would seem that the law upon this subject is directly the reverse in the Presidency towns to that which is in the mofussil, unless the provisions of the Evidence Act override the provisions of Act XVIII. of 1862, sections 26, 27. I should very much doubt, that so sweeping a rule, as is contained in section 105 of the Evidence Act, will be found to work well in all cases. But, in the present instance, the law in the Mofussil Courts is, apparently, that which common sense seems to me to teach, namely, that, in a case of this kind, the Court had a right to call upon the party making the imputation to show that he has some reasonable ground for making it.

It appears to me, however, that, in this case, the defendant did show reasonable grounds for making the imputation. He had been long at enmity with Hur Narain Mohaputtur: he had been falsely accused in 1868, and he had left the district. Subsequently, he returned on an assurance from some officer of Government that he would not be molested. He was again

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falsely accused in January of this year, and there is reasonable ground for believing that Hur Narain Mohaputtur was connected with all these accusations. Very soon after the last accusation, the defendant presented the petition which is the foundation of these proceedings. The defendant is probably a timid man, and nothing is more likely than these conversations were got up expressly with the object that they might be reported to him, and so frighten him away again from the neighbourhood. That appears to me to be the true point of view from which the case ought to be looked at. The Sessions Judge seems to have looked upon the question before him as one of law, whereas, to my mind, it is one purely of fact.

In my opinion, the judgment of the Sessions Judge is erroneous, in law, in that he has not considered the true question which arose for his determination; but I do not think it necessary to send the case back. I have no doubt whatever that the defendant ought to have been acquitted. The conviction and sentence of the Joint Magistrate will be set aside.

PRINSEP, J. PRINSEP, J. :—

One Shibo Proshad Pandah appears to have been involved in disputes with his zemindar and some of his own relations, which led to two cases being brought against him in the Criminal Courts. These were dismissed. He then presented a petition to the Joint Magistrate of Balasore, on the 14th December, stating that he had been informed, and had good reason to believe, that his enemies were conspiring together, and would shortly bring some false charge of a serious nature against him. It does not appear that this petition was filed with any intention except to give general information to the Magistrate, and it should, therefore, have been returned by that officer. Hur Narain Mohaputtur, a Mokhtar's Mohurrir, who was one of the persons named in that petition, at once took advantage of his knowledge of the Penal Code, and brought a charge of defamation under section 500. There can be little doubt that the petition does, *prima facie*, amount to defamation as defined in section 499.

The Magistrate, in dealing with this case, required the accused to prove his allegations that the imputations were true; and, find-

ing that he had failed, not only in this, but also in proving "good faith," so as to bring himself within exceptions 8 and 9 to section 499 of the Indian Penal Code, the Magistrate convicted the accused, and sentenced him to simple imprisonment for two months, and to a fine of Rs. 50, or, in default of payment, to imprisonment for another month. The Sessions Judge of Cuttack dismissed the appeal, holding that the accused had failed to prove "good faith" so as to get the benefit of exceptions 8 and 9, and agreeing with the Magistrate in thinking the evidence of the witnesses for the defence false. •

Mr. Branson, who appears before us sitting as a Court of Revision, contends that, as laid down in Act XVIII. of 1862, section 27, "good faith" should have been presumed unless the contrary appeared; and, next, that neither the Magistrate nor the Sessions Judge had considered whether the accused had been informed by his witnesses, persons of respectability, of this conspiracy against him, and so had good reason for believing that information; but that they had rather only considered whether these witnesses had themselves heard the use of threats of injury to the accused. In order to understand rightly the first objection, it is necessary to consider the course of legislation. The Penal Code (Act XLV. of 1860) has, since the 1st January 1861, been law throughout British India, and applies equally to Presidency towns within the jurisdiction of the Supreme Courts or of the High Courts in their Original Criminal Jurisdiction, as to Mofussil Courts without that jurisdiction. At the same time, Act XXV. of 1861 prescribed a Criminal Procedure for all Courts except those in Presidency towns. The Penal Code contained a chapter of general exceptions to offences (Chapter IV.), and for certain offences (one of which is defamation) special exceptions were provided. The Code of Criminal Procedure made special provision for these exceptions, and for the burden of proof to establish any of them. The effect of sections 235, 236 was, that it was for an accused person to establish the existence of any of the general exceptions, while section 237 provided that, if the charge denied the existence of any of the special exceptions to an offence, the absence of circumstances constituting such exception was to be assumed. This was the state of the law

[CRIMINAL.]

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without the Presidency-towns until the Evidence Act, I. of 1872, and the Code of Criminal Procedure of 1872, were passed, when sections 235, 237 were repealed with the rest of the former Code, and in their place section 105 of the Evidence Act was enacted, which threw the burden of proof on the accused, to prove the existence of any general or special exception.

Act XVIII. of 1862, which came in force on the 1st of May of that year, laid down the procedure on several points for High Courts in the exercise of Original Criminal Jurisdiction, and section 26 of that Act laid down a rule similar to that contained in sections 235, 237 of the Code of Criminal Procedure of 1861; but section 27 declared that, "on proving the existence of circumstances to a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, or 10th exception to section 499 of the Indian Penal Code, good faith shall be presumed, unless the contrary appears."

It is remarkable that, though the greater portion of Act XVIII. of 1862 was repealed by Act I. of 1872, and though section 26 of Act XVIII. is identical with section 105 of the Evidence Act of 1872, yet both section 26 and section 27 still remain law. Act XVIII. of 1862 was passed, so its preamble sets forth, "pending the preparation of a Code of Criminal Procedure for Her Majesty's Supreme Courts of Judicature," and it therefore applies only to such Courts. The provisor contained in section 27 does not extend to Mofussil Courts, and I am not prepared to concede that what is express law for one set of Courts must necessarily be the law for another set. For some reason or other, the Legislature thought proper to make this provision for the Supreme Courts—or what are now the High Courts—in the exercise of their Original Criminal Jurisdiction; but it is clear that this is not the law elsewhere in British India. I observe that this has been so held by the Bombay High Court in the case of *Reg. vs. Kikabhai Paibhadar*, 9 Bom. H. C. R. 451.

The question, then, remains, has the accused shown that he acted with good faith, that is to say, with due care or attention (section 52, Indian Penal Code), in making that petition to the Magistrate? It appears to me that this point has not been properly tried either by the Magistrate or by the Sessions Judge on

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appeal. The Magistrate confined his attention to determining whether the allegation of conspiracy was true, instead of finding whether the accused was told of it by his witnesses, and consequently had good reason to believe that it was true; unless we are to understand from his judgment that, because the Magistrate did not believe the statements of the witnesses as to the existence of the conspiracy, the accused could have no sufficient reason for believing them, and, therefore, that he did not act on good faith, *i. e.*, with due care and attention, in believing the statements made by those persons. I do not think that I should be justified in placing this construction on the Magistrate's judgment. The Sessions Judge seems to have indulged himself in theoretical speculations instead of applying himself to a consideration of pure questions of fact, and, in the latter portion of his judgment, he briefly endorses the conclusions of the Magistrate.

For these reasons I am of opinion that the conviction and sentence, as they stand, cannot be maintained; and that the real question at issue has never been tried; but I do not think that it is necessary that this trial should be continued, since the facts seem to me to show that the accused, a comparatively ignorant and timid man, has been much harassed by the complainant in this case (a Mokhtar's clerk) and others of superior intelligence and knowledge of the law; and though he would seem to have acted in a somewhat unusual manner in presenting this petition to the Magistrate, I have little doubt that he acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others; and I would remark that the Magistrate would have acted more properly had he refused to take the petition which has given rise to the present proceedings. I therefore agree in setting aside the conviction and sentence.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
July 31st.

IN THE MATTER OF JOJA PASHAN . . . PETITIONER.

No. 113
of 1878.

*Re-trial—Acquittal—Failure of Justice—Code of Criminal Procedure,
sections 220, 216—Charge—Preparing a charge.*

A man accused of theft was acquitted by the Deputy Magistrate under section 220 of the Code of Criminal Procedure. The District Magistrate, at the instance of the police, ordered the case to be re-tried. It appeared that the Deputy Magistrate had not framed any charge, but that no failure of justice had been occasioned by his not doing so.

Held that the Magistrate had no power to order a re-trial, without first setting aside the order of acquittal; and that he had no power to set aside the order of acquittal, as the case had not been appealed to him.

THIS was a motion on a petition by one Joja Pashan, praying that an order passed by the Magistrate of Monghyr, directing him to be re-tried after acquittal, might be quashed. The facts appear in the judgment of the High Court (1), which was delivered by

AINSLIE, J. AINSLIE, J. :—

Joja Pashan was charged by one Sham Saha with house-breaking and theft. The charge was tried by the Deputy Magistrate of Monghyr. On the 28th of May, Sham Saha and six other persons were examined for the prosecution. On the 30th of May, the prisoner was examined. The first question put to him was, whether he had cut a hole in the house of the prosecutor, and stolen therefrom certain property. He denied having done so. He was further examined at considerable length, and he stated certain facts, which, if they could be proved, would exonerate him from the charge of burglary and theft; and he wound up by giving the names of the persons who could prove those facts, he having been specially asked whether

(1) AINSLIE and BROUGHTON, JJ.

he had any witnesses to prove them. I have not found the order for the summoning of the witnesses for the defence; but it appears that, on the 31st of May, a summons was issued, and on the 5th of June, two of the witnesses named by the accused were examined. On the 7th of June, the Deputy Magistrate recorded his judgment, in which he came to the conclusion that the charge against the accused was wilfully false; and he concluded in these words: "His" (that is, the accused's) "witnesses support his plea. I must dismiss the case, acquit the accused under section 220 of the Procedure Code, and give permission to the accused for prosecuting the complainant for bringing a false charge of theft against him." After this, the Magistrate of the district, having been moved by the local police-authorities, directed that the accused should be re-tried. The accused person has come up to this Court by motion, protesting against that order, and asking the Court to set it aside as illegal, on the ground that, there having been an acquittal, it was not within the competence of the Magistrate to direct any further proceedings.

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In re
JOJA PASHAN.
Judgment.
AINSLIE, J.

It appears to us that the order of the Magistrate is wrong. There can be no doubt that the intention of the Deputy Magistrate was not merely to discharge the accused on the ground that there was not sufficient evidence for framing a charge against him, but to acquit him finally; and he cites section 220 of the Procedure Code, which provides for a final order after a complete trial. His giving permission to the accused to bring a counter-prosecution for a false charge of theft also shows that he did not merely mean to say that the case for the prosecution had not been established, but that it was a false case, and that the prisoner was not guilty in any sense.

The only ground upon which it is possible to support the Magistrate's order is that the Deputy Magistrate failed to draw up a charge; and that, therefore, he was not in a position to pass any judgment of acquittal. The explanation under section 220, no doubt, says that, "if no charge is drawn up, there can be no judgment of acquittal or conviction," but it goes on to say, "except in the case provided for in explanation I. to section 216," and that explanation is in the following words: "The omission

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In re
 JOJA PASHAN.
Judgment.
 AINSLIE, J.

to prepare a charge shall not invalidate the trial, if, in the opinion of the Court of Appeal or Revision, no failure of justice has been occasioned thereby." In order to show that there has been no valid acquittal, in consequence of the absence of the formal charge in writing, it is necessary to show that the absence of such charge has been in itself the cause of failure of justice, the words of the explanation being, not that "no failure of justice has occurred," but that it has not been "occasioned thereby."

It is quite clear that in the present case it is impossible to say that there was any failure of justice caused by the absence of a charge in writing. It may, of course, be that the prosecution could have adduced further evidence if it had been thought necessary, but it is not shown to us that any evidence was tendered to the Court and refused. The whole case for the prosecution which they intended to bring before the Court was closed. The accused person was then called upon to enter upon his defence and to produce his witnesses, and he did so. The trial was in every respect complete, excepting the absence of one particular paper. Had that formal charge been drawn up and annexed to the record, it does not appear that any steps would have been taken in this trial by the Deputy Magistrate other than those which were actually taken. It is, therefore, quite evident that no failure of justice was caused by the absence of a charge in writing.

The junior Government Pleader contended that the question whether there was a failure of justice or not is one which we are not to inquire into; and that it was within the competence of the Magistrate to determine this point. It seems to us that there is no foundation for such a contention. When a charge is dismissed by a Subordinate Magistrate, the District Magistrate may, under certain circumstances, proceed under section 142; but it is quite clear that he cannot do so where there has been a formal acquittal. The terms of section 460 bar any further trial so long as that acquittal remains in force; and that acquittal could not be set aside by the Magistrate unless he could deal with the case as a Court of Appeal. But there was no appeal before him, and therefore he was not at liberty to set aside the

acquittal; and that acquittal standing, he was not at liberty to take any steps whatever himself. We therefore think that the order of the Magistrate directing a re-trial, and all proceedings taken thereunder, must be quashed, and the accused, if arrested, must be discharged.

1878

In re

JOJA PASHAN.

Judgment.

AINSLIE, J.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF BAIKUNT KUMAR } PETITIONERS.
AND OTHERS }

July 22nd.

No. 134
of 1878.

*Possession—Magistrate's inquiry—Code of Criminal Procedure, sections 530, 533
—Local inquiry—Report.*

In a proceeding under section 530 of the Code of Criminal Procedure, the Magistrate must decide the fact of possession on evidence taken by himself, and not according to the result of a local inquiry made under section 533, unless the parties have consented to be bound thereby.

Per PRINSEP, J.—The local inquiry referred to in section 533 should be restricted solely to some question relating to the features of the property about which the dispute has arisen, and should not be directed to any matter which can be proved before the Magistrate by oral evidence.

CRIMINAL REFERENCE from the Magistrate of Burdwan, in a proceeding under section 530 of the Code of Criminal Procedure.

Mr. R. E. Twidale, for the Petitioners.

Baboo Saroda Churn Mitter for the Opposite Party.

The following judgments were delivered by the High Court (1) on the reference submitted:—

WHITE, J.:—

WHITE J.

In this case, the Officiating Joint Magistrate inquired, under section 530 of the Criminal Procedure Code, into the possession of a tank, to which there were two rival claimants. The

1878

In re

BAIKUNT
KUMAR.

Judgment.

WHITE, J.

Magistrate took no evidence before himself on the question of possession, but he made use of a report furnished by an officer whom he had, under section 533, deputed to make an inquiry. Now, having regard to the latter clause of the explanation in section 530, which directs that the question of possession should be decided on the evidence taken before the Magistrate, it is a matter of some doubt whether a Magistrate could, upon the question of possession, direct a local inquiry under section 533; but that difficulty is got over in this case, because both parties assented to a local inquiry being made. The error which the Magistrate has made in this case consists in his holding, that because the parties assented to such an inquiry taking place, they must abide by the result of that inquiry, and upon that footing making the order which is now sought to be set aside.

We have had the petition read upon which the local inquiry was directed. It was drawn up by the parties for whom Mr. Twidale appears. The present applicants wrote on the margin of the petition that they assented to the local inquiry, but there is nothing in the language which they use to show that they consented to abide by the result of that inquiry. The consequence is, that the order of the Magistrate cannot stand. We, therefore, set it aside, and direct the Magistrate to proceed anew with the inquiry, taking before himself the evidence of the rival claimants and their witnesses on the question of possession.

PRINSEP, J. PRINSEP, J. :—

The question raised in this case is whether any, and if so what, effect is to be given to the report of the Subordinate Magistrate who was deputed to make a local inquiry under section 533 of the Criminal Procedure Code, and who, after recording the evidence of some witnesses, has submitted a report as to the question of possession. The objection raised is, that the Superior Magistrate, who instituted the proceedings under section 530, was bound to decide the question of possession on the evidence taken before himself, and that he erroneously acted in this case solely upon the evidence taken before the Subordinate Magistrate. Section 533 is a provision which appeared for the

first time in the present Code of Criminal Procedure. To me it appears that the local inquiry to which it refers should be restricted solely to some question relating to the feature of property about which the dispute has arisen, and that it should not be directed to any matter which can be proved before the Magistrate by oral evidence, such as the question of actual possession. There is nothing in the Code which declares that the evidence which is taken in the course of that inquiry, shall be evidence in the case, but on the contrary the terms of the explanation to section 530 expressly provide that the Magistrate who institutes the case may satisfy himself, as to the existence of the dispute likely to induce a breach of the peace, from the report or other information, but that the question of possession must be decided on evidence taken before him. There is nothing in section 533 which declares that the evidence taken in the course of the local inquiry shall be evidence in the case such as there is in the Code of Civil Procedure relating to evidence taken by Commissioners or Ameens. Therefore, I am inclined to think that the scope of a local inquiry under section 533 is extremely limited, and that the Magistrate's instructions must, as stated in that section, be consistent with the law for the time being in force, that is to say, they are not to relate to any question of possession, which must be decided solely upon the evidence taken before himself. Of course, I do not mean to say that, in a case of this kind, which is somewhat of the nature of a civil suit, where both parties agree that evidence may be taken by a Subordinate Magistrate, and that they will abide by the result of such an inquiry, the decision of such a matter may not depend upon the result of the evidence so taken; but that is not so in the present case.

1878

*In re*BAIKUNT
KUMAR.*Judgment.*

PRINSEP, J.

[CRIMINAL REFERENCE.]

July 3rd. ISHEN CHUNDER KURMOKAR COMPLAINANT;

No. 938 of
1878.

AND

HURRY DOYAL KURMOKAR DEFENDANT.

*Interpretation—Sessions Cases—Act X. of 1872, section 296—Discharge of
Accused—Witness—Examination of witness—Revival of Proceedings.*

In section 296 of the Code of Criminal Procedure, "Sessions Cases" mean cases exclusively triable by a Court of Session.

Where the Deputy Magistrate discharges an accused person without having examined the principal witness in the case, his order is bad, and the District Magistrate is competent to revive the proceedings.

Empress vs. Donelly, I. L. R., 2 Cal. 405, cited and followed.

CRIMINAL REFERENCE from the Sessions Judge of Dacca.
The order of reference is as follows:—

"This case was originally tried by Moulvie Abdool Guffoor, the Deputy Magistrate of Dacca, who discharged the defendant under section 195 of the Criminal Procedure Code. The case was brought by the complainant to the notice of the District Magistrate, who called up and examined the complainant's mother, whom the Deputy Magistrate had not examined, apparently because she was reported not overstrong in the head.

"I think that in this case the Magistrate's order is contrary to the law as at present settled. The offence for which the

prisoner was tried was theft under section 380 of the Indian Penal Code; and this not being exclusively triable by the Court of Session, the Magistrate had not the power to commit. I feel bound, therefore, to lay the proceeding before the High Court in order that the proceeding may be quashed."

The judgment of the High Court (1) on the reference submitted is as follows:—

1878
 ISHEN
 CHUNDER
 KURMOKAR
 v.
 HURRY
 DOYAL
 KURMOKAR.
 Judgment.

The Deputy Magistrate, Moulvie Abdool Guffoor, discharged the accused, but on the application of the complainant the District Magistrate has committed him to the Court of Session, notwithstanding that objection to his jurisdiction was raised. The Magistrate appears to have considered that he had jurisdiction, because, this being a case regarding an offence triable by the Court of Session as well as by a Magistrate, he could act under section 296 of the Code of Criminal Procedure. The Sessions Judge has referred the case to have this commitment set aside as illegal.

The grounds on which the Magistrate held that he could re-open this case are bad, as it has been held that the term "Sessions case" in section 296 means a case triable exclusively by the Court of Session. But we think that the commitment should be maintained on another ground.

— The Deputy Magistrate discharged the accused without examining the principal witness in the case, the woman who was alone present in the house when it was robbed, because, as the Sessions Judge expresses it, "she was reported not overstrong in the head." The Deputy Magistrate's order was, therefore, bad, and under the rule laid down in the case of *Empress vs. Donnelly*, I. L. R., 2 Calcutta 405 (see page 412), the District Magistrate was competent to revive the proceedings, further evidence being available. We, therefore, decline to interfere.

(1) MARKBY and PRINSEP, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

1878
June 19th.

IN THE MATTER OF SHEO SURN LALL PETITIONER.

Section 491, Code of Criminal Procedure—Security to keep the peace—Probable resistance to lawful Collection of rent.

The petitioner, a *tehsildar*, applied to the Police for assistance to protect him while distraining the crops of certain ryots for arrears of rent. On this being reported to the Magistrate, he required the petitioner to furnish security to keep the peace on the ground that any riot which might result from the resistance of the ryots to the attachment of their crops would be attributable to his act. This order was set aside by the High Court as illegal, because the Magistrate had not found that the petitioner himself was likely to commit a breach of the peace.

THIS was an application made to the High Court as a Court of Revision to set aside, as contrary to law, an order of the Magistrate of Shahabad requiring the petitioner to furnish security to keep the peace.

Baboo Chunder Madhub Ghose and Baboo Juddonath Lahiri for the Petitioner.

The facts of this case sufficiently appear from the following judgment of the High Court (1):—

We have read the Magistrate's order, and the grounds on which it was passed. He finds that the petitioner is the *tehsildar* of the village of Atmi, and that there are disputes between his employee, who is the *ticcadar*, and the cultivators in the village respecting the rate of rent. He also finds that the petitioner applied to the Police to protect him while attaching the ryots' crops for arrears of rent; and, considering that any riot which may result from the resistance of the cultivators to the attachment of their crops will be attributable to the petitioner, he has bound him down under section 491, Criminal Procedure Code.

We are of opinion that, as the Magistrate has not found that the petitioner is himself likely to commit a breach of the peace, he ought not to have held him responsible by anticipation for the result of resistance to his acts which are not shown to be illegal, or likely to induce a breach of the peace. We set aside the order complained of.

1878
In re
SHEO SURN
LALL.
Judgment.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF MUSSAMUT SURGEE (CONVICT).

July 24th.

Jurisdiction—Third-class Powers—Second-class Powers—Magistrate—Code of Criminal Procedure, section 294.

On the 22nd of May 1878, a Deputy Magistrate, invested with 3rd-class powers only, sentenced an accused person to three months' imprisonment under section 417 of the Penal Code, thus exercising 2nd-class powers. On appeal, the Magistrate, on the 18th of June, annulled the sentence and directed a new trial, under section 284 of the Code of Criminal Procedure. On the 26th of June the Government issued a notification, investing the Deputy Magistrate with 2nd-class powers, to take effect from the 25th of March to the 31st of May 1878.

Held that the notification did not render the Magistrate's order illegal, as the Deputy Magistrate had no jurisdiction to exercise 2nd-class powers on the 22nd of May.

REFERENCE under section 296 of the Code of Criminal Procedure, from the Magistrate of Dacca. The facts of the case are set out as follows in the Magistrate's letter:—

"On the 22nd of May, Mr. C. G. M. Shircore, Deputy Magistrate, who held only 3rd-class powers, but who was erroneously exercising 2nd-class powers, sentenced the accused under section 417 of the Indian Penal Code, to three months' rigorous imprisonment. When the case came up on appeal, on the 18th June, I annulled the sentence under section 284 of the Code of Criminal Procedure, and directed a re-trial. After that in the *Gazette* of 26th June 1878, Pt. I, p. 703, Mr. Shircore was invested with 2nd-class powers, with effect from the 25th of March to the 31st of May 1878. My order annulling the sentence is now, therefore, wrong, and I ask the High Court to quash it, and direct me to hear the appeal on its merits."

1878

In re
MUSSAMUT
SURGE.

Judgment.

The judgment of the High Court (1) on the reference submitted is as follows:—

We do not think it proper to interfere. Mr. Shircore had no jurisdiction on the 22nd of May, when he convicted and sentenced the accused. The order investing him with jurisdiction was not issued by Government, until the 26th of June, and could not affect the District Magistrate's order on appeal, which was a proper order, inasmuch as Mr. Shircore had no jurisdiction on that date.

(1) MARKBY and PRINSEP, JJ.

[CRIMINAL REFERENCE.]

MOHESH MUNDUL COMPLAINANT;

AND

BHOLANATH MUNDUL ACCUSED.

1878
August 29thNo. 28 of
1878.

*Code of Criminal Procedure, section 308—Bail—Convicted person—Prisoner—
Fine—Joint fine.*

The proper course of procedure under section 308 of the Code of Criminal Procedure is to impose a fine, and out of the fine realized to direct payment to the complainant of such amount as the Court thinks fit, having regard to the provisions of the section.

A Court of Session acting under section 296 of the Code of Criminal Procedure has no power to admit a convicted person to bail.

Kanhai Sahu's case, 23 W. R. Crim. 40, cited and followed.

CRIMINAL REFERENCE from the Judge of Jessore. In this case the Joint Magistrate convicted the accused under sections 143 and 447 of the Penal Code; sentenced him to rigorous imprisonment for one month, and directed that "the accused will also pay" to the complainant two sums of twenty rupees and eleven rupees. It appeared from the Joint Magistrate's order that these sums were not imposed as fines. The Sessions Judge admitted the prisoner to bail, and referred the case to the High Court under section 296 of the Code of Criminal Procedure.

The judgment of the High Court (1) on the reference submitted is as follows:—

The order of the Magistrate, directing the payment of twenty rupees and eleven rupees, is not in accordance with the provisions of section 308 of the Code of Criminal Procedure. The prescribed course is for the Magistrate to impose a fine, and out of the fine realized to direct payment to the complainant of such amount as it thinks fit, having regard to the provisions of the section. As it stands there is no procedure for enforcing it, and it must, therefore, be quashed. We accordingly set it aside.

(1) AINSLIE and MACLEAN, JJ.

1878

MOHESH
MUNDUL
v.BHOLANATH
MUNDUL.

Judgment.

We cannot interfere with the order of imprisonment. We have to call the attention of the 'Sessions Judge to the case of *Kanhai Sahu*, 23 W. R. Crim. 40, in which it was held that a Court of Session, acting under section 296, has no power to admit a convicted person to bail.

MOHESH MUNDUL *vs.* BHOLANATH BISWAS AND OTHERS.—*A, B, and C, having been convicted of mischief, the Joint Magistrate sentenced A to one month's imprisonment, and B and C each to pay a fine of ten rupees. He also directed that twelve rupees should be paid to the complainant. Held that the order for costs was not a fine to be applied under the provisions of section 308; that what portion of the twelve rupees was payable by each of the accused being undetermined, it could not be said that A was sentenced to fine and imprisonment, and therefore no appeal lay; and that, as the case was one in which the police could not arrest without warrant, the Magistrate had power to award costs under section 31 of the Court Fees Act, VII. of 1870, but that these costs must be limited to costs out of pocket.*

This was a Criminal Reference from the same Judge. The Deputy Magistrate convicted the accused of mischief, and sentenced Bholanath Biswas to one month's rigorous imprisonment, and the other two to pay a fine of ten rupees each, or, in default, to be rigorously imprisoned for one month. He also directed the three prisoners to pay twelve rupees cost to the complainant. The Magistrate referred the case to the High Court to have the latter part of the order quashed.

AINSLIE, J. (MACLEAN, J., concurring): In this case the order for costs is clearly not a fine to be applied under the provisions of section 308. There is no provision in the Code for the imposition of a joint and several fine. As the amount payable by each accused is undetermined, it is impossible to say that any fine was imposed upon Bholanath in addition to the imprisonment awarded. He, therefore, had no right of appeal, and must undergo the sentence passed upon him. In this case the offence under section 426 being one in respect of which the police cannot arrest without warrant, the Magistrate was authorized, under section 31 of Act VII. of 1870, to award certain specified costs; but if the Magistrate had been acting under that section, he should have caused a statement of costs to be appended to his order, and could not exceed the actual costs of the complainant out of pocket. In this case also the Judge has erred in admitting the convicted prisoners to bail. The order awarding twelve rupees costs is quashed.

[CRIMINAL REFERENCE.]

IN THE MATTER OF PARBUTTI CHURN BOSE AND ANOTHER.

1878
August 30th,*Recognizance, Forfeiture of—Security to keep the peace—Forfeiture of Recognizance—Penalty—Act X. of 1872, section 502.*No. 367 of
1878.

On the 20th of April 1877, A was bound down to keep the peace for one year. On the 14th of January 1878, he was convicted of an offence and sentenced therefor to fine and imprisonment, but no order was made for the recovery of the penalty, though the Magistrate knew that the recognizance had been forfeited. On the 2nd of April 1878, the Magistrate, at the instance of a third party, called upon A to show cause why the penalty of the recognizance should not be paid, and a warrant for its recovery was issued on the 6th of June 1878. Held that the warrant must be quashed, on the ground that the Magistrate having inflicted a sentence of fine and imprisonment with the knowledge that the recognizance was forfeited, he was not competent to inflict a further penalty on a reconsideration of the circumstances.

CRIMINAL REFERENCE from the Judge of Jessore. The terms of the reference are as follow:—

It appears that the petitioners Parbutti Churn Bose and Huri Churn Bose were, on the 20th of April 1877, bound down to keep the peace for one year, personally in the sum of Rs. 200, and security being also given for Rs. 200.

“On the 14th January 1878, these two persons were convicted by the Deputy Magistrate, under section 379 of the Indian Penal Code, and sentenced each to three weeks’ rigorous imprisonment, and a fine of Rs. 20, the theft, it appears, relating to cutting of paddy by order of defendants. It may be observed that in his judgment the Deputy Magistrate notices the fact that they had been bound over to keep the peace, but takes no steps to enforce the penalty, nor does the Magistrate, who dismissed the appeal on the 6th of February. It was not until after a petition, dated the 10th Bysak 1285 (corresponding to 2nd April 1878), had been presented, that steps were taken to enforce the penalty, and an order directing the forfeiture of recognizances was passed by Mr. Taylor, the present Officiating Joint Magistrate, on the 17th June 1878.

[CRIMINAL.]

C. L. R., 39.

1878

In re
PARBUTTI
CHURN BOSE.

Reference.

"With reference to the judgment of the High Court, dated August 30th, 1877, in re *Ram Chunder Lalla, petitioner*, which has been brought to my notice by the pleader for petitioners, I beg to recommend that the Officiating Joint Magistrate's order be set aside. It was passed after the term had expired, although the offence for which they were convicted by the Deputy Magistrate was, as appears from the Officiating Magistrate's judgment, committed before, *viz.*, on the 12th or 13th Aughran 1284, corresponding with the 26th or 27th November 1877. I have before observed that neither the Deputy Magistrate nor the District Magistrate had taken action to enforce the penalty."

The following judgments were delivered by the High Court (1) on the reference submitted:—

AINSLIE, J. AINSLIE, J. :—

In this case, as in the case referred to by the Judge, the forfeiture of recognizance to keep the peace has been added to the punishment awarded for a specific offence at the instigation of a person other than the person injured by the offence which constituted the breach of the conditions of the bond, and after the term covered by the bond had expired. The fact that Parbutti Churn Bose and Huri Churn Bose were under recognizances was perfectly well known to the convicting Magistrate, who repeatedly refers to it in his judgment, and it could not have escaped the notice of the District Magistrate to whom there was an appeal from the conviction; it is, therefore, unnecessary to presume knowledge. Neither of these officers considered it necessary to enforce a forfeiture of the recognizances, and the offence with which the accused were charged was dealt with by inflicting what was considered adequate punishment, consisting of rigorous imprisonment and fine.

After this case had been thus dealt with, a petition was presented to the Magistrate by one of the persons interested in the original matter which had led to the recognizances being taken, but not in the later complaint, asking him to proceed on the recognizances. Acting on this petition the Magistrate has declared them for-

(1) AINSLIE and MACLEAN, JJ.

feited; and it happens that this petition was presented, and this action taken after the term of the recognizances had expired, though this is not material.

It thus appears that the Magistrate has, by a second order, added to the penalty imposed for the act done by the accused. It must be assumed that, when the Magistrate determined the measure of punishment to be inflicted, he took into consideration all the circumstances of the case, and that he deliberately fixed on a certain measure of punishment as adequate. It is impossible to say that if he had at the time proceeded on the recognizances, and thereunder imposed a fine of two hundred rupees on the accused, he would have passed the other sentence which, in fact, he did pass. He might have passed that or any more severe sentence warranted by law, and at the same time might have forfeited the recognizance if he had thought it necessary to do so; but then it would have been evident that he considered the entire cumulative penalty appropriate.

As matters stand, we have a punishment measured out which must be taken to be the full punishment which the convicting Court considered appropriate at the time, and then we have super-added, on a review of the circumstances at another time, an additional penalty, the effect of which must be to make the original penalty, when viewed as only a part of the punishment inflicted, an excessive one.

Although the words of sections 460 and 464 may not exactly cover the case, it seems to me to come distinctly within the spirit of those sections. When an accused person is brought before a Court charged with the commission of a certain act which makes him liable to be dealt with as an offender, the Court in dealing with him is bound to take into consideration all the circumstances before it which may affect the measure of punishment awarded and must be taken to have considered them, whether it has, in fact, done so or not.

The course adopted by the Magistrate, therefore, involves a further punishment for the same act after a decision by a competent officer (in this case the District Magistrate himself) that the act might be adequately atoned for by a certain fixed measure of punishment.

1878

In re

PARBUTTI
CHURN BOSE.

Judgment.

AINSIE, J.

1878

*In re*PARBUTTI
CHURN BOSE.

I would, therefore, quash the Magistrate's proceedings for the forfeiture of the recognizances, and direct that any money recovered thereunder be refunded.

Judgment. MACLEAN, J. :—

MACLEAN, J. I think that in this case the District Magistrate was bound, under section 502 of the Criminal Procedure Code, to call upon Parbutti Churn Bose and Huri Churn Bose to show cause why the penalty of their recognizance-bond should not be paid as soon as the forfeiture was proved before him, and he would then have had to consider what punishment was suitable for the offence entailing the forfeiture in addition to the penalty due under the recognizance-bond.

The Deputy Magistrate having referred to the recognizance-bond in his judgment, the District Magistrate was aware that it had been forfeited, and it is not more than fair to Parbutti and Huri to suppose that the Magistrates thought that a sentence of imprisonment and fine was the appropriate and full penalty for their offence. At least, if they did not think so, they should have stated in their judgments that, in addition to the punishments then dealt out, proceedings would be taken to recover the penalty of the recognizance-bond.

It cannot be the intention of the Legislature that, when a forfeiture of a bond has been proved before a Magistrate, the recovery of the penalty is to be kept suspended over the head of the person liable, for an indefinite period. I concur in quashing the order in this case for the realization of the penalty.

[CRIMINAL APPELLATE JURISDICTION.]

BISSURAM KOIREE APPELLANT;

1878
August 16th

AND

THE EMPRESS RESPONDENT.

No. 44 of
1878.*Adultery—Sagai Wives—Marriage of Widows—Behar, Customs of Castes in.*

Sagai wives, i. e., widows married in accordance with the custom of *Sagai* prevailing amongst the Koirees and other low castes of Behar, are so far the legal wives of their husbands as to justify the punishment of persons committing adultery with them.

CRIMINAL APPEAL from a judgment and sentence passed by the Sessions Judge of Patna. The judgment is as follows:—

• In this case the prisoner is charged with having committed adultery with one Parbuttia, the wife of one Janki, prosecutor.

The points for decision are:

First—Was the alleged act of adultery committed? *Second*—Was Parbuttia the *Sagai* wife of Janki? *Third*—Was she known to prisoner to be the *Sagai* wife of Janki? *Fourth*—Are *Sagai* wives, i. e., females married in accordance with the custom of *Sagai* prevailing amongst the Koirees and other low castes of Behar, the legal wives of their husbands, so as to justify the punishments of persons committing adultery with them?

[The learned Judge here recapitulated the evidence on the first three points which were found in the affirmative, and then proceeded.]

As to the fourth point it has been very warmly urged by the Counsel for the prisoner that the *Sagai* marriages are no marriages at all, and that, therefore, even if the prisoner did have sexual intercourse with Parbuttia, he cannot be held guilty of adultery.

It has been contended that from the evidence it would appear that Brahmins do not officiate at the *Sagai* marriage, the main ceremony being the putting of a red or *Sindur* mark on the bride's forehead in the presence of assembled friends and relatives.

1878

BISSURAM
KOIREK

v.

THE
EMRESS.Judgment.

Even supposing that widows can be allowed to marry a second time, they should, when doing so, go through the forms prescribed in the Shastras, otherwise they are not married.

This Court is clear that the usual forms prescribed for Hindu marriages *prima facie* cannot possibly, or at any rate need not be necessarily gone through in the case of widow marriages practised by the lower orders or castes. If it had been shown that as a rule and by custom those forms are always observed, but were not observed in this instance, it might undoubtedly have been urged that Parbuttia was not married. No such argument has been raised, and there is no ground for believing that Parbuttia's marriage was performed otherwise than according to custom, as deposed to by Sebak Mahtoo.

It has also been contended that *Sagai* is a name which is indiscriminately applied to two different things, namely, the marriage of a widow, and also by a sort of euphemism to a bigamist marriage, that is, the marriage of a woman whose husband is alive to another husband of the same caste.

With reference to the above contention, evidence has undoubtedly been given which establishes the fact that, in some instances, a woman who marries another husband, while her first husband is alive, induces a *punchait* to restore her to caste by the payment of a fine. It is, however, quite clear that, although such marriages are then, after recognition by the *punchait* and not otherwise, called, '*Sagai*' marriages, they are deemed improper marriages, and are not in any sense real *Sagai* marriages or marriages contracted by widows. Such marriages are, on the contrary, valid without the permission of any *punchait*, and are admitted even by the witnesses for the defence, several of whom have *Sagai* wives, to be just as good as *Biyahee*, or first marriages. It has in no way been shown that Parbuttia married when her first husband was alive; on the contrary, there is evidence (and that evidence is un rebutted) to show that her former husband Budhoo was dead when she married Janki according to the *Sagai* form of marriage. It would be ridiculous to hold that her *Sagai* marriage was invalid, simply because the same name is loosely used with reference to connections which have, so to speak, been irregularly sanctioned by *punchaits* after levying a fine. The

Court is far from holding that such connections are legally valid, but that is not the point now before it.

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Two precedents have been quoted from the Bombay High Court Reports, Vol. II., pp. 175, 125, in which it has been held that marriages entered into during the lifetime of the first husband cannot be legalized even by custom. As already stated, such a doctrine may or may not be correct, but it does not affect the question now before the Court. Parbuttia's marriage as a widow to Janki, is not, as the law now stands, *per se* illegal, and it has been amply proved by the evidence adduced by both sides that, in numerous low castes in Behar, *i.e.*, Koirees, Dosad, Gowa-lahs, Teelees and others, widow marriages solemnized by the mere affixing of a red or *Sindur* mark in the presence of friends and relatives have long been and are still prevalent, and considered in every way as valid as *Biyahee* or first marriages.

Looking to the whole evidence before it, and after full consideration of the arguments raised by the prisoner's Counsel, this Court has no hesitation in holding that *Sagai* marriages, *i.e.*, the widow marriages entered into in this province by Koirees and other lower castes, are, in every sense of the word, legal and valid. The prisoner is not, therefore, entitled to an acquittal, simply because Parbuttia was not Janki's *Biyahee*, but his *Sagai* wife. The prisoner is sentenced to two years' rigorous imprisonment.

Moonshee *Mahomed Yusoof* for Appellant.

The judgment of the High Court (1) was delivered by—

AINSLIE, J. :—

AINSLIE, J.

The Court below has, upon the evidence in this case, held that there is a custom of re-marriage in the class to which the complainant and accused belong, which is known as *Sagai*; that the position of a wife who is married in this form, except in respect of participation in oblations to the gods, differs in no respect from the position of a wife married in the ordinary *Biyahee* form; and that, in respect of the legitimacy of the children of such marriages, both forms stand on the same footing. It is also

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shown by the evidence that, although undoubtedly this form of marriage sits very loosely on persons of this caste in that part of the country, still adultery is recognized as an offence of which the caste takes notice, and that continued cohabitation of the adulterer and the woman are not recognized as legal until a fine imposed by the *punchait* to whom the matter is submitted for decision is paid.

The payment of that fine appears to have the effect of a dissolution of the first marriage and legalization of subsequent cohabitation. Whether, strictly speaking, it would have that effect, it is not necessary for us to decide. According to the cases referred to by the Sessions Judge in the Bombay Reports, it is doubtful whether it would. However, that does not affect the present question. Even supposing that the decision of the *punchait* could bring about a valid divorce and legalize subsequent cohabitation, that does not touch the question whether, previous to their decision, the first marriage was in existence or had been dissolved. As I understand the contention of the learned pleader for the accused, it is this, that the connection with a man other than the husband by itself dissolves a marriage of this class, and therefore it is within the option of the woman to terminate it at any moment she pleases. Such a doctrine is novel, and requires evidence of custom to support it, which certainly is not to be found in this case. In the absence of very positive evidence, it cannot be expected that this Court will do anything to relax the already very loose bond of marriage which is recognized by certain castes in Behar.

We think that the conclusion arrived at by the Judge and Assessors is a correct one, and that the conviction is proper, but considering the nature of the form of marriage and the ease with which it may be dissolved, we think that the penalty of two years' rigorous imprisonment is more than necessary under the circumstances. We, therefore, reduce it to six months.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF THE EMPRESS
 AND
 HARADHAN TAMULI

1878
 Sept. 21st

Criminal Procedure Code, section 273—Distinct offences—Conviction—Appeal.

Where a person is charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence for the purpose of determining whether an appeal lies under section 273 of the Code of Criminal Procedure or not.

THIS was a case referred under section 296 of the Code of Criminal Procedure by the (Officiating) Sessions Judge of Bankura, to the High Court as a Court of Revision.

The facts of the case are these: One Haradhan Tamuli was required to give evidence before the Magistrate, and a summons was accordingly issued in his name. On the day fixed for the trial he did not appear, but his attendance was procured on a subsequent day when he denied that he had received the summons.

The Magistrate was of opinion that such denial was false, and directed his prosecution upon two charges—the one of disobedience to the summons, under section 174, and the other, of giving false evidence, under section 193 of the Indian Penal Code.

Both charges were tried together, and disposed of in one judgment. The Magistrate convicted the prisoner of both charges, and sentenced him, by one and the same order, for the first offence, to pay a fine of Rs. 20, or in default be simply imprisoned for one month, and for the second to be rigorously imprisoned for one month.

The prisoner appealed against both sentences. The Sessions Judge held that the summons had never been served upon the accused, and therefore dismissed the conviction upon the charge of disobedience. He found, however, that one of the statements

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imputed to the prisoner was false, and upheld the conviction upon the charge under section 193.

The question submitted to the High Court for its consideration was—whether having regard to section 273 of the Code of Criminal Procedure, the Sessions Judge had jurisdiction to entertain the appeal from the minor sentence.

The following judgments were delivered by the Court (1):—

MITTER, J. MITTER, J. :—

I am of opinion that the Sessions Judge had jurisdiction to set aside the conviction and sentence passed upon the prisoner in this case under section 174, Indian Penal Code.

The prisoner in the Magistrate's Court was put upon his trial upon two charges at the same time. It is doubtful whether this course is in accordance with the provisions of sections 452 and 453 of the Criminal Procedure Code. It is not necessary for us to express any opinion upon this question. But the prisoner having been charged with two separate offences in one trial, the amount of the whole punishment awarded for the two offences must be regarded as one sentence, for the purpose of determining whether an appeal lies under section 273 or not. I am of opinion, therefore, that the order passed on appeal by the Sessions Judge in this case is not illegal.

BROUGH-
TON, J.

BROUGHTON, J. :—

I agree in thinking that, for the purpose of determining whether an appeal lies under these circumstances, the whole punishment must be regarded as one, and that the course taken by the Judge is legal.

(1) MITTER and BROUGHTON, JJ.

[CRIMINAL REFERENCE.]

THE EMPRESS

1878
Nov. 12th.

AND

TOYLUKHO NATH CHOWDHRY AND OTHERS

*Indian Penal Code, section 108, expls. 2 and 4—Theft—Removal of goods with
Owner's Permission—Abetment.*

The owners of certain goods having been informed by a servant in their employ of a proposal made to him by the accused that he should join him in removing and converting such goods to their own use, allowed the accused so to remove the goods: In the act of removal, the accused was arrested and charged with theft, and with having abetted the commission of the offence of theft.

Held that no theft had been committed, the goods having been removed with the knowledge of the owners.

Held further, that the accused was guilty of abetment, although the technical offence of theft had not been committed.

REFERENCE to the High Court under section 240 of the Presidency Magistrates Act.

The following are the terms of the Reference:—

"The above defendants were charged, under section 380 of the Indian Penal Code, with stealing some iron and brass screws from the godowns of Messrs. Mackinnon, Mackenzie, & Co., at Fairlie Place. The following facts were proved in the case: Messrs. Mackinnon, Mackenzie, & Co. were in the habit of selling hardware by public auction through the agency of Messrs. Mackenzie, Lyall, & Co. For the purpose of these sales, a Sircar used to come from the Exchange to the godown, lot the goods, and take away samples, upon which the auctions were held; after the sales, the same Sircar came with the purchaser, and made delivery of the goods; the last sale took place on the 16th of August; on the 19th, the first defendant came to deliver some goods; and then asked the godown-keeper, Mr. Cummins, to allow him to take out more goods than what were actually mentioned in the catalogue of sale, the profits to be divided among them in the proportion of 6 to 10. Cummins mentioned this to Mr. Moncreiff, who represented the owners; and with his permission, he assented to the first defendant's proposal; the plan was finally matured at Cummins' house on the 24th of August; on the 4th of September, the first defendant came accompanied

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by the 2nd and 3rd defendants who were purchasers, and pursuant to the agreement between the first defendant and Cummins, goods in excess of those mentioned in the catalogue were removed; but the police who had been communicated with were on the watch, and immediately arrested the defendants. It was also proved that it was a frequent practice in the trade for the purchasers to take excess goods by giving a receipt to Mackenzie, Lyall's Baboo (in this case the first defendant), who on his part gave a receipt to Mackinnon, Mackenzie, & Co.; and that the purchaser had no concern whatever with the sellers' firm. There being absolutely no legal evidence of guilty knowledge as against the purchaser defendants. I have discharged them. With reference to the first defendant, I have held that, inasmuch as he removed the articles with the express or implied consent of the owners, his act did not amount to theft (explanation 5 to section 378 of the Indian Penal Code; *Reg. vs. Dolan*, 6 Cox, C. C. 449; *Reg. vs. Hancock*, Law Times, July 27th, 1878). I have held further that the first defendant is liable to a conviction under section 116, as explanation 4 to section 108 appeared to me to show that, though the offence of theft might not have been committed, yet as the accused instigated Cummins to abet him in the commission of the theft, he is guilty under the section referred to. As, however, I entertain some doubts, I solicit the opinion of the High Court on both these points, *viz.*: (1) Whether, in view of the fact that the goods were removed with the consent of the owners, the act of the defendant amounts to theft; and (2) whether the defendant, under the circumstances, is liable to a conviction under section 116. I have passed judgment subject to the decision of this Honorable Court, but have reserved sentence for a fortnight. I have remanded the prisoner to custody, subject to any order the Honorable Court may be pleased to make with reference to bail.

Bell for the Prosecution.

The following judgments were delivered by the High Court (1):

JACKSON, J. JACKSON, J. :—

It appears to me that, under explanation 4 of the 108th section of the Indian Penal Code, the abetment of an abetment being an offence, and the prisoner having instigated Cummins to do that which, if committed, would have been an offence he has himself thereby committed an offence, and, inasmuch as by explanation 2, to constitute the offence of abetment it is not necessary that the act abetted should be committed, therefore the circumstance that, owing to the property being removed with the knowledge of the owner, the technical offence of theft had not been committed, does not save

the prisoner from the consequence of the abetment which he has been guilty of, and, therefore, he has been properly convicted. The prisoner will be brought up before the Magistrate for sentence.

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—

WHITE, J. :—

I agree in thinking that, upon the facts found by the Magistrate, the prisoner may be properly convicted of the offence of abetting an offence.

[CRIMINAL REVISIONAL JURISDICTION.]

THE EMPRESS July 29th.

AND

KHODAI SINGH

Indian Penal Code, section 193—Imprisonment, Sentence of—Criminal Procedure Code, section 297, clause 6.

Under section 193 of the Indian Penal Code, it is obligatory upon the Court, in every case of conviction under that section, to pass some sentence of imprisonment.

ONE Khodai Singh was charged before the Sessions Judge of Tirhoot with giving false evidence in a judicial proceeding, and found guilty under section 193 of the Indian Penal Code. The Judge sentenced him to pay a fine of Rs. 100, or in default to be rigorously imprisoned for one month. The case now came before the High Court in its Revisional Jurisdiction.

The following judgments were delivered by the High Court (1) :—

MARKBY, J. :—

MARKBY, J.

Section 193 seems to make it imperative upon the Court to pass some sentence of imprisonment in every case of conviction under that section. This omission might be cured but not without giving notice to the prisoner, and, as he has suffered no injury, and the Crown does not complain, I do not think it necessary that we should interfere.

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PRINSEP, J.

In my opinion we *must* "annul" what is undoubtedly an illegal sentence, and "pass a sentence in accordance with law" (see section 297, clause VI., Code of Criminal Procedure).

This matter has "come to the knowledge" of the High Court on perusal of the Sessions statements of the District of Tirhoot. The Sessions Judge has sentenced a convict to fine only, on conviction of intentionally giving false evidence (section 193, Penal Code), where the law provides imprisonment *and* fine, not *or* fine, as a punishment for that offence. It seems to me that we cannot allow this illegal sentence to stand. It may, in the present instance, amount to a mere matter of form, as the Sessions Judge has recorded that the offence committed is not a serious one; but, as a matter of principle, I think that a proper sentence must be passed, and that we cannot pass over this error.

The convict should be called upon to show cause why the sentence passed on him by the Sessions Judge of Tirhoot should not be set aside, and a proper sentence passed in accordance with law.

JACKSON, J. JACKSON, J. :—

The papers of this case were laid before me on the 24th July.

Khodai was convicted before the Sessions Court of Tirhoot of an offence under section 193, Indian Penal Code, and sentenced to pay a fine of Rs. 100, or, in default, to be rigorously imprisoned for one month.

The Code (section 193) directs that a person guilty of such offence "shall be punished with imprisonment

* The schedule attached to the Code of Criminal Procedure is, perhaps, misleading, as it does not preserve this distinction.

and shall *also be liable* to fine;" and thus it is clear that the sentence of imprisonment is obligatory, and that of fine, discretionary.*

We must, I think, assume that the Legislature has deliberately (in my opinion, most wisely) determined that every person, who is convicted of giving false evidence, should be marked with the stigma of imprisonment, and it is the duty of the Courts to carry out that intention.

In the present instance, the accused had given false evidence in a judicial proceeding, and the Judge who convicted him says: "The false statement in question, I judge under the surrounding circumstances, was made intentionally and deliberately, and it certainly had a material bearing on the result of the trial for theft, compelling the Joint Magistrate to acquit the defendants charged with that offence."

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JACKSON, J.

The Sessions Judge then continues, unaccountably as it seems to me: "Taking everything into consideration, I am not inclined to pass a heavy sentence," and he proceeds to pass that which is under consideration.

I am of opinion that the irregularity is one which this Court is bound as a Court of Revision to correct; and if the proper sentences of imprisonment had appeared to be a nominal one, I should not have thought it necessary to give notice, as the Code of Criminal Procedure expressly takes away the right of being heard, and the law is too clear to admit of argument; but as I am not satisfied that the imprisonment ought to be nominal, I agree with my brother PRINSEP, that notice should be given to Khodai Singh to show cause why the Court should not proceed to pass on him such sentence of imprisonment as it deems proper.

[CRIMINAL JURISDICTION.]

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Dec. 18th.
No. 160 of
1878.

RAJAH KUMUD NARAIN BHOOP . PETITIONER;
AND
MOHIM CHUNDER AND OTHERS . OPPOSITE PARTIES.

Notice—Criminal Procedure Code, section 530—Jurisdiction—Intervenor.

Notice under section 530 of the Code of Criminal Procedure is a specific notice to the individuals interested in the dispute in consequence of which the proceedings have arisen, and is not a general citation to the public.

There is no provision in that Code by which an intervenor can come in and claim possession of the property which is already the subject of proceedings under section 530 in connection with a dispute between other persons, unless the Magistrate shall be satisfied of the existence of a dispute between such intervenor and some one else likely to give rise to a breach of the peace, and have recorded a fresh preliminary proceeding to that effect.

CRIMINAL MOTION to set aside an order passed by the Extra Assistant Commissioner of Goalpara.

Baboo *Hem Chunder Banerjee* and Baboo *Isshur Chunder Chuckerbutty* for Petitioner.

Baboo *Gooroo Dass Banerjee* and Baboo *Umakally Mookerjee* for Opposite Parties.

The facts are sufficiently set forth in the following judgment of the High Court (1), which was delivered by—

AINSLIE, J. AINSLIE, J. :—

On the 23rd February 1878, the Extra Assistant Commissioner of Goalpara, from proceedings before him, was led to the belief that there was a likelihood of a breach of the peace in consequence of a dispute about certain lands between Rajah Kumud Narain Bhoop on one side and Puddo Kishore Burna on the other side. He consequently directed that proceedings should be

held under section 530 of the Criminal Procedure Code, and recording a proceeding reciting the existence of this dispute, he caused notice to be given to the parties above-named.

These persons in the end came to an amicable settlement of their dispute; but, in the meantime, shortly before this settlement was effected, another party, Gopi Nath Chuckerbutty, came in on 9th May, and put forward a claim to the possession of a portion of the land covered by the Magistrate's notice.

Eventually an order was made by the Magistrate on 24th June, declaring Gopi Nath to be the party in possession.

The Rajah has applied to this Court to quash this order, as made without jurisdiction, and the only question we have to consider is this one of jurisdiction.

In many cases it has been held that a proceeding, such as is required by section 530, is a necessary preliminary, and Mr. Justice NORMAN in the case of *Kashi Kishore Roy vs. Tarini Kant Lahori* (3 B. L. R., Cr. 76) points out that one object of this is to prevent a Magistrate from rashly interfering with questions of possession which should ordinarily be decided by the Civil Courts, except in cases where a breach of the peace is apprehended, and where it is necessary, for the preservation of public order, that steps be taken in the Criminal Court.

The power given to a Magistrate to make a binding declaration as to the possession of property is an exceptional one, and is conferred in a chapter (XL.) forming a portion of part XI. of the Code, which is entitled "Preventive Jurisdiction of Magistrates." Section 530 limits the exercise of this power to cases in which the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists. And it is this likelihood, the consequent necessity for immediate action, which alone warrants action by the Magistrate under Chapter XL., and the Magistrate is obliged to certify the grounds on which he believes in the existence of a likelihood of a breach of the peace by recording them in a proceeding. The practice, under section 318 of the Code of 1861, and 530 of the Criminal Procedure Code, has, as we believe, been uniformly to issue notice to certain parties indicated in the information on which the Magistrate's action is based. The law does

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—
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—
AINSWIE, J.

not provide for a public notice or proclamation calling upon all parties concerned to attend the Magistrate's Court. It is true that by the words, "shall call upon all parties concerned in such dispute," no particular mode of giving notice is expressly prescribed, but nevertheless we are of opinion that the language of the section indicates that the notice shall be to known individuals. The Magistrate must be satisfied that there is a dispute serious enough to be likely to lead to a breach of the peace. Although the explanation in no way restricts him in reference to the character of the information upon which he proposes to take action, yet it is obvious that the information must at least indicate the disputing parties. If the Magistrate is unable to point to any one or more persons on one side as said to be engaged in a dispute with one or more persons on the other, it is difficult to understand how he can reasonably declare himself satisfied of the existence of a dispute, and it is only when satisfied of the existence of a dispute that he is to call upon all parties concerned in such dispute. This clearly shows that the call is addressed to individuals and not to the public.

Baboo Gooroo Dass Banerjee relied upon the words "shall call upon *all* persons concerned" as showing that the law contemplated something in the way of a general citation, and supported this view by referring to the last words of the section, "forbidding *all* disturbance of possession until such time," but in the absence of any specific declaration that the procedure is to be by a public citation, we think that the latter words can only be taken as applying to the parties of whose dispute the Magistrate has knowledge.

This view is confirmed by the language of section 531: "If such Magistrate decides that *neither of the parties* is in possession or is unable," &c. Had it been intended that the declaration should operate as universally binding, the words would have been "that no party is in possession." The section, as it stands, shows that the Magistrate's order is to be directed to those persons actually before him (or who, having been called upon, have failed to appear).

In this view of the law it seems to us that the proceedings taken after the compromise were not properly taken. There is no provision in the Criminal Procedure Code for allowing an "inter-

venor" to come in the middle of proceedings held by a Magistrate under section 530. As to such third party, the Magistrate has, "*ex hypothesi*," no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the only ground upon which he can enter upon an inquiry as to the possession of such third party at the date of the commencement of the pending proceedings is wanting. As to any thing of later date, he may take such steps in a separate proceeding as circumstances call for and the law allows.

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The order of the Extra Assistant Commissioner, made on the 24th June 1878, in favour of Gopi Nath Chuckerbutty, is set aside, and the whole proceedings as regards him are quashed. As regards the original parties before the Magistrate, no order is requisite, inasmuch as the dispute between them is at an end.

[CRIMINAL MOTION.]

¹⁸⁷⁹
Jan. 31st. IN RE FATA IYAH KHAN PETITIONER.

No. 2 of 1879 *Criminal Procedure Code, section 471—Cases exclusively triable by Sessions Court—
Indian Penal Code, section 193.*

It is only in cases exclusively triable by a Court of Session, that such Court has power to commit, or hold to bail and try an accused person charged with the offences mentioned in sections 467, 468, and 469 of the Code of Criminal Procedure.

The words "commit the case itself," occurring in section 471, do not empower a Court of Session to commit to itself a person charged with giving false evidence before it, under section 193 of the Indian Penal Code.

THE facts of this case are set out in the following judgment of the High Court (1):—

In this case the Sessions Judge of Burdwan has committed the petitioner before us to take his trial before the Court of Session on a charge of having given false evidence in a stage of a judicial proceeding, viz., a trial held in the Court of Session, under section 193 of the Indian Penal Code. The Sessions Judge has himself held the preliminary inquiry, and committed the case to the Court of Session.

We are asked to set aside this commitment as made in contravention of the provisions of the Code of Criminal Procedure. The Sessions Judge, in the explanation which he has submitted, states that, in his opinion, section 471 empowers him to commit this case, and that that power is not limited or restricted by the provisions of the following section 472. We think that the learned Judge has taken an erroneous view of the law, and that the interpretation he would put upon these sections cannot be supported. The offence with which Fata Iyah Khan is charged is admittedly not one that is triable by the Court of Session

exclusively. It is only in cases exclusively triable by the Court of Session that the Judge is empowered to commit or hold to bail and try an accused person charged with the offences mentioned in sections 467, 468, and 469. In cases of a light nature, which are not triable by the Court of Session exclusively, all that the Judge is empowered to do is to send the case for inquiry to any Magistrate having power to try or commit for trial the accused person under section 471. The words "commit the case itself," occurring in section 471, do not mean that the Court of Session may commit the case to itself, as the Judge would interpret. If the section would bear this interpretation, it would be opposed to the distinct provisions of section 231, which restricts and limits the action of the Court of Session as a Court of Original Criminal Jurisdiction, save and except in the cases provided for by sections 435 and 472.

We are of opinion that the procedure adopted by the Sessions Judge in this case is not warranted by law, and we, therefore, quash the commitment to the Court of Session, and direct the Sessions Judge to send the case for inquiry to the Magistrate, who will deal with it as he thinks fit.

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[CRIMINAL APPELLATE JURISDICTION.]

¹⁸⁷⁹
March 18th. IN THE MATTER OF BIYOGI BHAGUT . . . APPELLANT.
 No. 146 of *Dismissal of Complaint—Prosecution under section 211 of Penal Code (Act*
 1879. *XLV. of 1860)—Right of Complainant to be examined.*

A charge of burglary and theft having been preferred against two persons, the Magistrate before whom the charge was laid, after comparing the petition of complaint with the papers submitted to him by the police, who had made an inquiry and reported the charge to be false, directed, without having taken the examination of the complainant, that the case should be struck out, and that proceedings should be instituted against the complainant under section 182 of the Indian Penal Code. Proceedings were accordingly taken, and the complainant was ultimately tried and found guilty of an offence under section 211.

Held, on appeal, that the proceedings had been irregular and should be quashed; that the Magistrate should be directed to re-open the inquiry into the charge of burglary and theft, first examining the complainant; and that, if after such examination he should be of opinion that the charge was false, the appellant might be proceeded against under section 211 of the Penal Code.

THE facts are sufficiently set forth in the following judgments, which were delivered by the Court (1):—

Baboo *Pran Nath Pundit*, for Petitioner.

JACKSON, J. JACKSON, J. :—

The appellant before us preferred a charge of theft and house-breaking at a police-station against two persons named Limgut and Bal Gobind. The police-officer in charge of the thannah made his inquiry, and reported to the Magistrate that the case was false. But the complainant was not satisfied, and some time after appeared before the Magistrate and requested that a further inquiry might be made. Upon that the Magistrate desired that the petition should be laid before him along with the papers in the police inquiry. Later on, having compared the papers in question with the petition, he directed that the case should be struck off, and that proceedings should be taken against the com-

plainant Biyogi Bhagut, firstly, under section 182 of the Indian Penal Code.

Proceedings were accordingly taken, and ultimately he was committed for trial and was convicted by the Sessions Judge, differing from the assessors, of an offence under section 211, and for this offence imprisoned for five years—a very severe sentence no doubt.

The objection has been taken before us for the first time on appeal that these proceedings are bad in law, because the Magistrate, having the appellant's complaint before him, dismissed it without taking down his examination in writing and making inquiry into it, and it is contended that, unless such inquiry had been made and terminated formally in favour of the accused person, no proceedings under section 211 could be taken.

There are, I admit, several reported cases in which various learned Judges of this Court have expressed opinions more or less in agreement with this contention. I myself do not concur in all these opinions, and as to some of them I am precluded by the terms in which they are expressed from attaching very great weight to them, because in some of these cases the opinion is not expressed very decidedly, and in others the decision has been given with reference to the particular facts of the case before the Court.

It appears to me that, so far as the positive provisions of the Code of Criminal Procedure go, the complainant, on appearing before the Magistrate, is entitled to demand that his examination should be taken and reduced into writing. But I conceive that the Magistrate, having examined the complainant, is authorized by section 146, if he sees cause to distrust the truth of the complaint, to "postpone the issuing of process or compelling the attendance of the person complained against, and to direct a previous inquiry or investigation to be made into the truth of the complaint;" and if, as the result of such previous inquiry, it appears to the Magistrate that there is no sufficient ground for proceeding, he may dismiss the complaint, and thereupon, so far as the complainant is concerned, the complaint is absolutely at an end, and, I should say, thereupon proceedings, under section 182 and section 211, may be directed or sanctioned. I am aware of no warrant for laying it down that in such a case, before sanctioning proceedings under section 211, the Magistrate is bound to hear

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*In re*BIVOGI
BHAGUT.*Judgment.*

JACKSON, J.

witnesses in support of the accusation, in order to ascertain whether the complaint is true or unfounded. The appellant before us, therefore, is, in my view, borne out in saying that the Magistrate ought to have first examined him, and so far there has been a formal defect in the proceedings. Now, the way in which such a defect may be made use of at the trial, on behalf of the accused, is by alleging that he has been prejudiced by it. No such allegation appears to have been made at the trial, and it has been, for the first time, brought before us on appeal. I myself should not be very much inclined to give weight to this objection; but my brother McDONELL thinks it worth something, and the opinion is borne out by the rulings to which I have alluded. Of course if, as the result of further proceedings, the prisoner finds himself in a worse position than he is now in, and if he should choose to add to the offence of making a false complaint that of giving false evidence on oath, it is entirely at his option to do so. Therefore, in deference to the opinion of my learned brother and, in some degree, to the rulings that I have mentioned, I think it right to quash the proceedings in this trial, and direct that the Magistrate should re-open the inquiry into the charge of theft and burglary, first examining the complainant. Then if, upon further inquiry and after examining the complainant, the Magistrate sees no reason to proceed in the matter of the complaint, or if, after full inquiry, the falsehood of the charge is clearly made out, the appellant will be open to proceedings against him under section 211 as before, or under any other section of the Code which may apply; and it appears to me the Magistrate should require him to give recognizance to attend and prosecute the charge of theft and burglary.

McDONELL, J. McDONELL, J. :—

I consider that the accused was materially prejudiced by the way in which the proceedings were conducted. The Magistrate, before he took proceedings under section 211, I. P. C., should have taken down the examination of the complainant in writing, and should have made inquiry into it; and I am of opinion that the Magistrate would have used a wise discretion if he had examined the witnesses named by the complainant before instituting proceedings against him.

[CRIMINAL REFERENCE.]

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 —
 No. 53 of
 1879.

Code of Criminal Procedure (Act X, of 1872), sections 122 and 346—Confession unattested inadmissible—Secondary evidence to prove unattested confession.

A prisoner charged with murder confessed his guilt before the Magistrate, who recorded the confession under section 122 of the Code of Criminal Procedure, but omitted to append to the record the proper certificate, or obtain the attestation of the accused by his signature or mark, as required by section 346. The prisoner was finally committed to the Sessions Court for trial. *Held* that the omissions could not be rectified under any authority contained in the last clause of section 346 by taking the evidence of the recording officer that the prisoner duly made the statement recorded, and that the confession was not admissible in evidence.

Reg. vs. Bai Ratan, 10 Bom. H. C. R. 166, followed.

REFERENCE under section 263 of the Code of Criminal Procedure by the Officiating Sessions Judge of Patna.

The circumstances out of which this reference arose were these:—

The prisoner was arrested on the 16th November 1878 on a charge of murder, and early on the following morning taken by the police before the Deputy Magistrate, who at the time happened to be outside the division under his charge. There the prisoner made a full confession, and this confession the Magistrate recorded, attaching to the record the certificate required by section 122 of the Criminal Procedure Code. The confession was not attested by the mark or signature of the prisoner. On his return to his own district the Magistrate took up the case, and, having conducted the preliminary inquiry, examined the prisoner according to the provisions laid down by section 346.

At this examination, which took place on the 20th, the prisoner, in answer to a question, again stated he was guilty of the offence charged. This statement having been duly recorded, the Magis-

[CRIMINAL.]

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trate thereto appended the necessary certificate under section 346, the prisoner himself attesting the certificate. The result was that the accused was finally committed to the Court of Session.

When the case came on for trial, the Sessions Judge saw no reason to suppose that the confession made on the 17th November was otherwise than truly and voluntarily made, and upon that confession considered that the accused ought to be found guilty of the murder charged, two of the five jurors agreeing with him. At the trial, however, it was objected, on the authority of the case of *Bai Ratan*, reported in 10 Bom. H. C. R. 166, that this confession was defective as not having the proper certificate, and in not being signed or attested by the mark of the prisoner. Having a doubt as to whether the case cited should be followed, and being of opinion that if it were taken as an authority in the matter the prisoner must be acquitted, the Judge referred the matter to the High Court.

The terms of the reference were as follow :—

The prisoner made a full confession before the Deputy Magistrate, Mr. J. White, and it seems to me that there is not the slightest reason for supposing that the confession was otherwise than truly and voluntarily made. Two of the jurors concurred with me, and gave a very good reason for their opinion. Three of the jurors acquitted the prisoner, but the reason given by them for so doing is purely conjectural. I cannot account for their verdict, except by the supposition that they were averse to finding the prisoner guilty of a crime the punishment for which is death, for there were no extenuating circumstances of any kind.

It is only fair to the prisoner to mention that his counsel raised an important legal objection, which is undoubtedly supported by a decision of the Bombay High Court. This Court overruled the objection, on the ground stated in page 2 of the Sessions Record. It was of opinion that sections 346 and 122 should be read together, and that secondary evidence was admissible under section 346 to cure undoubted irregularities in the manner in which the confession was recorded. Prisoner did not affix his mark; the confession, though detailed, was not recorded in the vernacular; and there was no certificate under section 346, but only under section 122. It is clear, if the ruling of the Bombay High Court is to be followed, secondary evidence was not admissible, and prisoner is entitled to an acquittal.

The prisoner has been remanded to jail, pending the receipt of final orders from the High Court.

There was, besides the evidence already mentioned, considerable circumstantial evidence against the accused.

O'Kinealy, for the Prosecution. . .

Baboo *Amarendro Nath Chatterjee*, for the Accused.

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Judgment.

The following judgments were delivered by the High Court (1):—

MORRIS, J.:—

MORRIS, J.

The confession made by the prisoner on the 17th November 1878 must, I think, be treated as a confession recorded under the provisions of section 122 of the Criminal Procedure Code. The prisoner was arrested by the police on the afternoon of the 16th, and carried early the next morning before the Deputy Magistrate, Mr. White, who was then at a place, Bankipore, outside the limits of the division of which he had charge. Mr. White recorded the prisoner's confession and attached to it the certificate required by section 122. It is clear from this that Mr. White considered himself to be acting under the terms of that section. Subsequently Mr. White returned to Barrh, within the limits of his own division, and, having power to do so, took up the case against the prisoner, conducted the preliminary inquiry, examined the prisoner as prescribed by section 346, and finally, on the same date, the 20th November, committed him for trial before the Court of Session.

The confession after 17th November is undoubtedly defective, inasmuch as it does not bear the proper certificate, and it is not signed or attested by the mark of the prisoner. In these respects the confession was not taken in the manner provided in section 346, as prescribed by section 122. The question, therefore, arises, whether these omissions can be rectified under the authority contained in the last clause of section 346 by taking the evidence of the recording officer that the prisoner duly made the statement recorded. As at present advised, I think I ought to follow the ruling of the Full Bench of the Bombay Court on this point as given in the case of *Bai Ratan*, 10 Bom. H. C. R. 166, and hold that the imperfect record of the confession taken under the terms of

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section 122 cannot be repaired by secondary evidence. The special and express provision made to meet the case of an imperfect record of examination of a prisoner in the course of a preliminary inquiry cannot, in my opinion, be made applicable to the case of an imperfect record of a confession made before any Magistrate whilst the prisoner is still in the hands of the police, simply because such confession has to be taken in the manner provided in section 346. In this view, therefore, the confession of the 17th November is not admissible in evidence, and must be excluded from consideration altogether.

It remains to consider whether, setting this confession aside, there is sufficient evidence on the record to convict the prisoner. There is no doubt that on the 20th November, that is, on the fifth day after the murder, the prisoner being charged with the murder of the woman Bajya, and asked whether he was guilty or not, answered that he was guilty. This examination of his was duly recorded by the committing Magistrate in accordance with the provisions of section 346, and the committing Magistrate, who was examined by the Court of Session, has stated on oath that the prisoner was fully aware of the import of his answer. This admission of guilt, in regard to the voluntariness of which there can be no doubt, for the evidence of Mr. White and all the circumstances of the case show that no pressure was exercised, is alone sufficient to justify a conviction. But, independently, there is evidence of a reliable character to prove that the prisoner, who was one of the lovers of the woman Bajya, was jealous of her and quarrelled with her, and was the last person who was seen in her company. Two witnesses saw him with Bajya on the evening of the 15th November, walking in the direction of the garden in which she was found the next day lying murdered. One of these witnesses testified to the prisoner wearing a cap at the time, and a cap similar to the one worn by the prisoner was found stained with blood close to the body of the murdered woman. It is not proved that this particular cap is the prisoner's property; but this item of evidence is important as showing that the murderer was in all probability one of a cap-wearing class. Then when we add to this that the prisoner, so far from denying that he was in the company of Bajya on the evening

of the 15th, or explaining the circumstances under which he parted with her, frankly admits five days after before the Magistrate that he is guilty of the murder, there can, I think, be no reasonable doubt in the matter. I, therefore, concur in the view taken by the Sessions Judge, and convict the prisoner.

There are no mitigating circumstances apparent in the case. On the contrary, the murder was a cold-blooded and determined one, and I, therefore, think that sentence of death should be passed on the prisoner. We accordingly direct that the prisoner be hanged by the neck till he be dead.

WHITE, J.—

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I am of the same opinion. I agree that the statement made by the prisoner on the 17th November, and which is alleged to amount to a confession, is inadmissible in evidence. It was clearly taken under 122nd section of the Criminal Procedure Code. The prisoner was brought before Mr. White simply for the purpose of having his alleged confession recorded, and there are no grounds for saying that, when Mr. White took down the prisoner's statement, he was examining the prisoner in the course of a preliminary inquiry, or that he intended to do so. The circumstance that Mr. White was also the committing Magistrate furnishes no reason in my opinion why, upon Mr. White's proceedings on the 17th of November, a construction should be put which is contradicted by the facts. The alleged confession of the 17th November is defective for the reasons stated by my brother MORRIS, and upon the authority of the case in 10 Bom. H. C. R. 166 the defects cannot be remedied by examining Mr. White.

We are not at liberty, therefore, to look at the alleged confession of the 17th of November. It appears to me, however, that, independently and irrespective of it, there is no reasonable doubt upon the evidence that the prisoner is guilty of the offence with which he is charged. On the 20th November, after the witnesses for the prosecution had been examined, and before the committal of the prisoner, the charge was read over to him by Mr. White. It stated in detail the name of the murdered person, the date of the murder, and the mode in which the murder was supposed to have been perpetrated, and the prisoner, in answer to the question

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whether he was guilty of the offence, replied that he was guilty of the offence. To this statement the Magistrate appends the necessary certificate under section 346; and the prisoner has also put his attestation, thereby signifying his assent to the correctness of the statement.

A further question was put to the prisoner, "whether he intended to call any witnesses to prove his innocence," and he answered that he had some witnesses, and named two. It is objected that this further question and answer must be considered as modifying his previous reply. I am unable to see that they have that effect. The further question was a formal one, and the answer showing an intention on the part of the prisoner to call witnesses is not inconsistent with the confession of his guilt. His object may have been to produce witnesses for the purpose of mitigating the sentence which the Court might think fit to pass upon him. But, whatever his object was, he called no witnesses, either before he was committed for trial, or when on his trial before the Sessions Judge.

The prisoner having made the statement which he did on the 20th of November, it remains to be considered whether the statement was made voluntarily and without pressure, and whether it was a true statement. The evidence has been read to us *in extenso*, and there is no trace upon it of any pressure having been put upon the prisoner by any person in authority, or by any other person either before or at the time when the statement was made; and the circumstances under which the statement was made are in favour of the conclusion that the statement is voluntary. Then, is the statement true? Looking at the evidence adduced by the prosecution, it appears to me that there can be no reasonable doubt on this point. The prisoner was proved to have been in the company of the deceased late in the evening of the night previous to the discovery of the murder, and to have been the last person seen with her when she was last seen alive. It is also proved that he had a subsisting quarrel with the deceased; that she had been originally in his keeping, but had ceased to be so about six months previous to the occurrence; and that she had two other lovers whom she preferred to the prisoner; that these matters were the subject of disputes between the prisoner and the

deceased, and that shortly before the occurrence he had exhibited, in connection with them, angry feelings, towards her and jealousy.

I may also allude to another piece of evidence, which is this—that the Magistrate, who took down the inadmissible statement on the 17th of November, deposes that, after he had done so, he was struck with the apparent levity of the conduct of the prisoner in the face of the serious charge brought against him, and accordingly observed it to the prisoner in the following way: "Do you know what you have done? It is a very serious business." To which the prisoner replied, "I know what I have done; it is a matter of fate or *takdir*. I shall be hanged or transported."

It is true that in this case three, out of a jury of five, have acquitted the prisoner, but they do so upon a ground which appears to me to be without foundation when the evidence is examined. The ground is, that the confession of the prisoner might have been suggested by the police. Now, upon that ground, so far as it applies to the statement of the prisoner, which was made on the 17th, it is unnecessary to make any remark, as we have held that statement to be inadmissible. But with regard to the confession of the 20th, I think there is not the least reason for supposing that it was suggested by the police. On the other hand, it is to be remembered that two of the jury are of a contrary opinion to the majority of their brethren, and that the presiding Judge agrees with those two.

On the whole, it appears to me to be made out beyond a reasonable doubt that the prisoner is guilty of murdering the deceased.

I also concur with my brother MORRIS that we must pass upon the prisoner the usual sentence which the law prescribes for murder. The evidence shows that the prisoner, under the influence of vindictive feelings against the deceased, decoyed her from her house about nightfall under pretence that she would be absent only for a short time, and that when he got her alone in a garden at some distance from her house, he murdered her under circumstances of great brutality. The medical evidence shows that he must have been a strong man of a most determined character, and have had a settled and inflexible purpose to destroy his victim. The doctor says that the deceased was a young woman of 25 years of age and in the full vigour of womanhood, and that she

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appears to have been throttled, by the pressure of the hand; and that, in order to produce death by that means and to overcome the struggles of the deceased, great force must have been used by the prisoner, and the throat of the deceased must have been firmly and fiercely held for a long time. According to the Penal Code, we are bound in murder to pass the extreme sentence of the law, unless there are reasons why a lesser sentence should be passed, in which case the reasons must be recorded. It appears to me, on reading the evidence, that there are no extenuating circumstances in the present case which would justify us in reducing the punishment.

[CRIMINAL APPELLATE JURISDICTION.]

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ROHIMUDDIN AND OTHERS. APPELLANTS.

No. 191 of
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*Indian Penal Code, Act XLV. of 1860, section 300, Except. 5—Culpable
Homicide—Consent, Risk of death taken by.*

Where a person knowing that there is a likelihood of his being killed, deliberately engages with others in a fight with deadly weapons and is killed, he cannot be said to have "taken the risk of death with his own consent" within the meaning of exception 5 of section 300 of the Indian Penal Code, and the persons taking part in the fight are liable to be tried under section 149, and 302 of that Code for murder.

Per AINSLIE, J.—The 5th exception to section 300 of the Indian Penal Code applies to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result.

CRIMINAL APPEAL from a conviction by the Sessions Judge of Backergunge.

The facts are fully set forth in the following judgments of the Court (1):—

AINSLEE, J.:—

AINSLEE, J.

The Judge and Assessors have concurred in finding the prisoners guilty of culpable homicide not amounting to murder, committed in the course of a riot, and they have been sentenced under section 304 of the Indian Penal Code, read with section 149.

Other persons had been previously tried and convicted on account of the same matter. They were convicted of murder under section 302, read with section 149, and the conviction and sentence were affirmed by this Court on the 12th November 1878.

In the present trial the Officiating Judge has held that the case comes under the 5th exception of section 300 of the Penal Code. "Culpable homicide is not murder when the person whose death

(1) AINSLEE and BROUGHTON, JJ.

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AINSLIE, J.

is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

He says that "one of a body of professional *lathiyals*, armed with deadly weapons, is killed in a fight which these *lathiyals* have voluntarily entered into and provoked; his death cannot be murder." And in a previous passage he says: "They were not obliged to fight for the defence of person or property, but they provoked the fight and entered upon it willingly and with pre-consent. They were professional *lathiyals*, armed with spears, and their adversaries were also armed with spears. They were well aware of the risk they ran, and by their conduct showed that they took that risk willingly."

The facts are briefly these: That certain persons who may be called Lushker's party, to which the prisoners belonged, went armed with spears and lathies, to plough lands, claimed by one Abdool Ruheem Khondkar. The latter gathered men, and there was a disturbance and clods were thrown, but by the mediation of some bystanders a separation was effected.

Lushker's party began to withdraw, whereon Khondkar's party taunted them, and some violence was used towards one Hurri who was removing his plough. On this Lushker's party returned; some of Khondkar's men prepared themselves for fighting, and a fight occurred, in which Assuruddeen, one of Khondkar's party, was killed by several spear wounds, and another man was wounded.

The evidence shows that these men made deliberate preparations to meet the attack of Lushker's men, and that the case cannot come under exception 4th as a sudden fight in the heat of passion upon a sudden quarrel.

The assailants, in the first instance, had gone out armed with deadly weapons, and at the later stage at which the fight occurred, fighting was deliberately intended by both parties.

I cannot concur in the view taken by the Judge that, when persons of full age voluntarily engage in a fight with deadly weapons, they take the risk of death with their own consent; and that as a consequence culpable homicide occurring in such a fight is not murder.

If this view is correct, the 4th exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons

is not murder, *à fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel would not be murder. It seems to me that the 4th exception clearly indicates that culpable homicide in a fight is murder, unless it is unpremeditated, and the fight is such as is therein described, sudden, in the heat of passion, and on a sudden quarrel. A fight is not, *per se*, a palliating circumstance; only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent.

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I do not think that the 5th exception has any application to such a case. I understand that exception to apply to cases where a man consents to submit to the doing of some particular act, either knowing that it would certainly cause death, or that death will be likely to be the result, but that it does not refer to the running of a risk of death from something which a man intends to avert, if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.

The extract from the report of the Indian Law Commissioners, given in Morgan and Macpherson's Edition of the Penal Code, at page 265, contains instances to which the exception applies, and in my opinion, cases of this character only are properly to be dealt with under it.

The Judge ought to have convicted the prisoners under section 302, read with section 149, Penal Code, and sentenced them accordingly.

BROUGHTON, J.:-

BROUGH-
 TON, J.

I also think that the prisoners ought to have been convicted of murder under section 302, coupled with section 149, of the Indian Penal Code. The common object of the men assembled may have been, in the first instance, merely the ejection of the other party from the land, but they had retired, and, at the instance of mediators, had given up that object. Afterwards, the other party challenged them to come on again, and the deceased man and another, armed with spears, put themselves in a fighting position and awaited the return of the prisoner's party. They returned,

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some of them also being armed with spears, and accepted the challenge. The object of those who returned, and among them were the prisoners, was not then to eject the others from the land, but to engage in a deadly fight with spears. A man may be a member of an unlawful assembly as defined in section 141, and if armed with a deadly weapon, may be punishable under section 144, although no force has been used. If any force is used, he may be punishable under section 148; and if he be a member of a band of dacoits, and murder is committed, he may be punished under section 396, and in this case there may be no deadly weapon used; if a deadly weapon is used, he may be punished under section 398; all these instances show that the common object or intention of the assembly may be various, and that it must be judged from the proved circumstances of the case.

In the present case the common object or intention of the assembly was clearly to fight in such a way that the weapons they used would be likely to cause, and probably would cause, the death of one of their number or of one of their opponents.

It is said by the Sessions Judge, that the man who was slain invited or ran the risk of death, and that this brought the case within exception 5th of section 300 of the Indian Penal Code. But if that exception applies to the case, there appears to be no reason for exception 4th.

Where there is a fight between two contending parties, it is necessary, in order to apply exception 4th, that the fight should have been sudden and without premeditation; and a fight under any circumstances comprehends the kind of consent to which the Sessions Judge alludes. Here there was a certain time between the challenge and the fight, a short time it may be, but time for reflection; the parties were at a distance from each other when the challenge was given, and, consequently, had time to consider whether they would engage in the fight with deadly weapons or not. They determined to fight, and the death of one of the men was the result.

Exception 5th appears to me to apply to circumstances of a different character, as, for instance, to a case of suttee, not to a premeditated fight.

The prisoners have appealed; they say the evidence is not conclusive, and Nazir Mahomed says he had witnesses to prove an *alibi*. Witnesses were examined for the defence, and it does not appear that any were excluded. These witnesses support the case for the prosecution which is moreover proved by the testimony of wholly independent witnesses, namely, by the men who offered to mediate, and did, in fact, effect a cessation of hostilities between the contending parties. The Sessions Judge rightly says that the facts are clearly proved by the witnesses on both sides. That on the questions, whether the offence was murder or culpable homicide not amounting to murder, I agree in thinking that the Sessions Judge was mistaken. The case, in my opinion, is a case of murder, and that being so, the prisoners must be sentenced under the circumstances to transportation for life.

We annul the conviction and sentence passed by the Officiating Sessions Judge of Backergunge, and convict the prisoners, Rohimuddin, Nazir Mahomed, and Sumeruddin of the murder of Assuruddin, an offence punishable under section 302 of the Indian Penal Code, and sentence them to transportation for life.

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[CRIMINAL REFERENCE.]

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CHUNDER NAUTH DUTT

*Presidency Magistrates Act, IV. of 1877, section 87, explanation 2—
"Revival of a Prosecution."*

The revival of a prosecution, as mentioned in explanation 2 to section 87 of Act IV. of 1877 (The Presidency Magistrates Act), is not a continuation of the original prosecution, and upon such revival all the witnesses on whose evidence the prosecution intends to rely, as justifying the committal of the accused, must be examined before the Magistrate, and such of them as have been examined at the time of the original prosecution must be examined *de novo*.

REFERENCE to the High Court under section 240 of the Presidency Magistrates Act.

The terms of the reference were as follow :—

The defendant in this case surrendered, on the 30th July 1878, to a warrant issued by this Court for his arrest on the 26th July 1878, on a charge of stealing and fraudulently appropriating two unregistered letters containing currency notes and a hoondie. He was arraigned before me on the 30th July 1878. The prosecution cited certain witnesses, whose evidence was recorded for the commitment of the case to the sessions, but in spite of a warrant which was obtained under section 135 of the Presidency Magistrates Act, they failed to produce the material witness whose testimony, it was stated, would clinch the fact of theft. In the absence, therefore, of any evidence to connect the accused with the offence, and after every possible opportunity had been given to the prosecution to produce the absent witness, he was discharged on the 14th September 1878 under section 87 of Act IV. of 1877. On the 8th April 1879, this witness, Gopaul Chunder Ghose, was apprehended. Upon a statement made by him, an application was made by the Officiating Government Prosecutor to revive the charge against the defendant, Chunder Nauth Dutt, and a fresh warrant was applied for and obtained. The defendant was accordingly placed before this Court on the 29th April 1879, when the evidence of Gopaul Chunder Ghose was recorded in his presence. The Government Prosecutor does not propose now to examine any further witnesses, and applies that the case might be committed to the sessions upon the evidence taken on the previous occasions before the defendant was discharged, *plus* the evi-

dence taken after his re-arrest. He contends that the word "revival" in explanation 2, section 87, of Act IV. of 1877, implies that a proceeding against an accused, discharged under this section, may be revived at any time, and the point where it was left off should form the starting point for the proceeding which might be instituted in the second instance. I do not, however, agree with this view. I think when a prisoner is discharged for want of evidence, the former proceeding is at an end, and when a prosecution is revived, it is a fresh proceeding requiring the evidence to be gone into *de novo*. I hardly think the Legislature could have meant that a discharge under section 87 should be a remand *sine die*. Arguments have been drawn from the use of the word "revival," but these arguments appear to me to be fallacious. If the words had been "revival of the prosecution" instead of "revival of a prosecution," there might have been some force in the contention. I take it that the explanation to section 87 simply debars the defendant in certain cases to take the plea of *autre fois acquit*, but creates no especial procedure such as is contended for. For the reasons above stated, I am inclined to hold that no commitment can be made, and that as the Government Prosecutor does not propose to call witnesses to prove the material facts of the case, and so enable the defendant to cross-examine them with reference to the new evidence, the prosecution must fail.

As the point, however, is of considerable importance, I solicit the opinion of the Hon'ble High Court on the point, which I beg to state shortly, in the following terms:—

Whether a prosecution revived under explanation 2 to section 87 of Act IV. of 1877 is a continuation of the old proceeding, and whether the evidence after the "revival" should or should not be taken *de novo*?

Pending the opinion of the Hon'ble High Court on this reference, I have enlarged the defendant on bail to appear on the 20th instant.

The following judgments upon the reference were delivered by the Court (1):—

WHITE, J.:—

WHITE, J.

The question raised by the reference of the Officiating Chief Magistrate is as to the procedure to be adopted in cases under Chapter 8 of the Presidency Magistrates Act, when an accused person who has been discharged by the Magistrate under section 87 of that Act, because there are no sufficient grounds for committing the prisoner to take his trial, is at some subsequent time again prosecuted before the Magistrate for the same offence.

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1879 The Act in section 82 states specifically the procedure to be
 EMPRESS applied when an accused person is brought before the Magistrate
 v. under Chapter 8, and no distinction is made between the cases of
 CHUNDER a first and that of a second prosecution for the same offence.
 NAUTH DUTT.

Judgment. The argument that in a second prosecution the witnesses who
 WHITE, J. were examined on the first prosecution need not be examined
 again, but may be considered as giving evidence in support of the
 second prosecution, is based solely and entirely upon the circum-
 stance that the Legislature in explanation 2 of section 87 has
 described the second prosecution as "the revival of a prosecution."

I think the argument is not sound, and has no sufficient found-
 ation.

The argument is, in fact, an inference from the use of the
 word "revival."

The object of explanation 2, section 87, is to negative the sup-
 position that a discharge would be a bar to a second prosecution
 for the same offence. The explanation does not deal with the
 procedure which is to be adopted if such second prosecution
 should take place. The fact that the Legislature has described
 the second prosecution as "the revival of a prosecution" does
 not, in my opinion, warrant the inference, either that the evidence,
 upon which the first prosecution is based, is also revived, or that
 the procedure upon the second prosecution is to be different from
 that pointed out in section 82.

A further reason for this view is to be found in provision for
 adjournments which is contained in the same chapter of the Act.
 Under section 86 a Magistrate has large powers of adjourning an
 inquiry for reasonable cause, but no adjournment can be for
 longer than fifteen days at a time.

If upon a second prosecution, after a discharge, the Magis-
 trate is to treat the evidence that was given in the first prosecu-
 tion as evidence upon the second prosecution, or, as it is called
 in the reference before us, "taken up the case for the prosecution
 where it left off when the prisoner was discharged," the Magis-
 trate would in effect be acting as if he had adjourned the inquiry
sine die, which he has no power to do.

It cannot be supposed that the Legislature intended by the
 mere use of the words "revival of a prosecution" in explanation

2, section 87, to give the Magistrate such a power after it had carefully made provision by section 82 against unlimited adjournments.

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v.

CHUNDER

NAUTH DUTT.

Judgment.

In my opinion, the proper reply to the question of the Officiating Chief Magistrate is that a revival of a prosecution, as mentioned in explanation 2 of section 87, is not a continuation of the original prosecution from which the accused has been discharged, and that upon the revival of the prosecution all the witnesses on whose evidence the prosecution intends to rely as justifying the committal of the accused must be examined before the Magistrate, and, if any of them were examined at the time of the original prosecution, they must be examined *de novo*.

MORRIS, J.:—

MORRIS, J.

I concur.

[CRIMINAL JURISDICTION.]

1879
April 17th.No. 73 of
1879.

MAHARAJA OF BURDWAN PETITIONER;
AND
THE CHAIRMAN OF THE DARJEELING MUNICIPALITY.

*Criminal Procedure Code, Act X. of 1872, section 532—Dispute, Nature
of—Jurisdiction of Magistrate—Declaratory Decree.*

To enable a Magistrate to interfere in any matter under section 532 of the Code of Criminal Procedure (Act X. of 1872), there must be some substantial dispute in some way necessitating such interference.

That section only enables the Magistrate to prevent arbitrary interruption, by any person, of rights actually enjoyed by the public or a person or class of persons; it does not enable him to make a purely declaratory decree.

RULE to show cause why an order, passed by the Assistant Commissioner of Darjeeling, under section 532 of the Criminal Procedure Code, should not be set aside.

The order complained of was obtained under the following circumstances:—

There is a road at Darjeeling, it seems, running through the Maharaja of Burdwan's property and joining two public roads. It was stated in the petition, and it appears to be undisputed, that this road had from time to time been repaired, extended, and improved by the Maharaja at considerable expense, and that the Darjeeling authorities, when they were applied to in the matter, distinctly declined to repair the road or in any way to make themselves responsible for the expenses of keeping it up. For eleven years there had been gates on the lower end of the road.

There were other roads, admittedly private, running through the Maharaja's property, and upon all of these roads gates had been erected at different times.

In April or March 1878, Major Lewin, who had recently been appointed Deputy Commissioner of Darjeeling, discovered the gates, which had been erected on the lower end of the first-mentioned

road, and conjecturing, as he subsequently said in his evidence, that the road was a public road, he brought the matter to the notice of the Municipal Commissioners, he himself being Chairman of that body. On the 4th June, and again on the 15th July, resolutions were passed by the Commissioners to the effect that the Chairman should take the necessary steps for enquiring into the existence of a right-of-way along this road; and if it should appear that such right-of-way existed, he should take further steps to enforce it and remove any obstruction. Both of these resolutions were signed by Major Lewin. Meanwhile the Maharaja had been communicated with, and on the 19th June his Private Secretary wrote a letter to Major Lewin, pointing out that the Maharaja was perfectly willing to allow the public the use of the road during the day, but that he claimed the right to close the gates after dark, and to keep them shut till sunrise; and that, as a matter of fact, no one had ever been stopped on any of the Maharaja's roads.

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ITY.

Statement.
—

Nothing further seems to have been done until, on the 30th October, a summons was issued to the Maharaja from the Magistrate's Court to appear and answer a claim on behalf of the public, made under section 532 of the Criminal Procedure Code, with respect to the right-of-way over the road in question.

No notice was given as to the person or persons at whose instance the claim was made until the 7th December, when a letter was written by Major Lewin, as Deputy Commissioner, to the Maharaja, from which it appeared that the Municipal Commissioners were the claimants. In this letter an offer was made on their behalf to withdraw the proceedings in the Criminal Court if the Maharaja would undertake to bring a suit in a Civil Court against the inhabitants of Darjeeling to substantiate his claim to the road in question. This offer was declined. After numerous adjournments, the proceedings finally came on for hearing on the 18th January 1879.

The proceedings were made over by Major Lewin for trial and disposal to the Magistrate of Darjeeling, who was also Vice-Chairman of the Municipality, but had not taken any part in the proceedings of that body with reference to this matter.

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 ITY
 —
 Argument.

No evidence was given to show that any one had been obstructed or prevented from passing along the road. Major Lewin, who was called as a witness, explained that his object in taking these criminal proceedings was to force the Maharaja to bring a civil suit, as that course would cost the Municipality less money. On the part of the Maharaja it was contended that the proceedings were groundless and unnecessary; that there was no dispute within the meaning of section 532; and that the Magistrate therefore had no jurisdiction to pass any order under that section.

The Magistrate, however, held that he had jurisdiction, and in coming to this conclusion he says: "I come to this conclusion with much diffidence in the face of the strong ruling in *Rosik Lall Nundi vs. Kartik Shant*, 22 W. R., Cr. Rul., 48. I am, however, constrained to fall back on my own humble reasoning."

The order accordingly made by the Magistrate was "that possession of the road be not taken by the Maharaja of Burdwan, to the exclusion of the public, until he shall have obtained the decision of a competent Civil Court adjudging him to be entitled to such exclusive possession."

A rule was obtained, calling on the Municipal Commissioners to show cause why that order should not be set aside.

Woodroffe and Sale (with them Baboo Bussunt Coomar Bose), for the Petitioner.

Phillips (with him Baboo Ram Churn Mitter), for the Opposite Party.

Phillips.—There is a substantial dispute between the Maharaja on the one hand and the public on the other hand. The admission on the part of the Maharaja that the gates were shut at night is a sufficient obstruction to give the Magistrate jurisdiction under section 532 of the Criminal Procedure Code. The dispute described in that section may mean any dispute.

[JACKSON, J.—Can you suggest any limit to the action which might be taken by a Magistrate under this section?]

The section is wide. It is sufficient that there has been a claim made and resisted. It is not necessary, as under section 530, that the Magistrate should be apprehensive of a breach of the peace.—*Reg. vs. Toyluckonath Sircar*, 2 W. R., Cr. Rul., 64;

Chowdhree Zuhoorul Huq vs. Kurum Chand Singh, 24 W. R., 1879
Cr. Rul., 15; Reference dated 6th August 1870, 14 W. R., Cr.
Rul., 28.

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[JACKSON, J.—These cases show that the Magistrate should not interfere in speculative cases or disputes. The question here is whether there is a dispute or not.]

Phillips.—The putting up the gates upon this road is something more than a mere abstract claim to exercise some right over the road. The question really resolves itself into a technical question of jurisdiction. The Maharaja is in no way injured by the order.

Judgment.

Woodroffe.—There is no dispute within the meaning of section 532. The evidence shows that the Deputy Commissioner thought there might be right-of-way along the road; and the result was that these proceedings were brought to enquire into this possible right-of-way.

It is not necessary probably to argue that a breach of the peace should be imminent to give the Magistrate jurisdiction, though the case of *Rosik Lall Nundi vs. Kartik Shant*, 22 W. R., Cr. Rul., 48, seems to go to that length.

Mr. *Woodroffe* was here stopped by the Court. Mr. *Phillips* did not reply.

The judgment of the Court (1), which was as follows, was delivered by—

JACKSON, J.—

JACKSON, J.

This case comes before us upon a petition of the Maharaja of Burdwan. He complains of an order passed by Mr. Abbott, Assistant Commissioner, with powers of a Magistrate, at Darjeeling, under section 532 of the Code of Criminal Procedure. The subject to which this order related was a road which apparently passes over the ground of the Maharaja, and is claimed by the Maharaja as being his private road, and is not shown to have been in any sense belonging to, or maintained by, the public, but it is one over which it may be said the public have a limited right-of-way.

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JACKSON, J.

It seems that Major Lewin, who was the Deputy Commissioner of Darjeeling, in the course of his inspection of the station roads, observed this road with gates or gate-posts at one end of it, and it struck him that the road was, or ought to be, a public thoroughfare. He, therefore, consulted with the Municipal Commissioners, and the result was that they authorized him to move in the matter and, if necessary, take proceedings to establish the supposed right-of-way. Thereupon Major Lewin, in his capacity of Deputy Commissioner, instituted proceedings, and referred them for hearing and trial to Mr. Abbott; and Mr. Abbott passed the order which is now complained of, *viz.*, that "possession of the road running along the jhara from the black gates on the Cart Road to the black gates on the Victoria Road, and lying between those gates, be not taken by the Maharaja of Burdwan to the exclusion of the public and inhabitants of the Darjeeling Municipality, until he shall have obtained the decision of a competent Civil Court adjudging him to be entitled to exclusive possession."

When this rule was obtained, our attention was called to the fact that the Magistrate who decided the case was himself the Vice-Chairman of the Municipality, and some comment was made on the position which he and Major Lewin occupied, being in part that of prosecutor and in part judge, in the matter. But we find that, irrespective of the necessity for such plurality of offices, which no doubt occasionally arises, and which leads to Magistrates occupying a somewhat anomalous position in such proceedings, there really is no valid objection to Mr. Abbott's deciding this case, because it appears that he took no part in those deliberations of the Municipality out of which these proceedings arose.

But a more serious question remains as to the authority of the Magistrate to make such order and the propriety of that order.

The terms of section 532 do no doubt differ from those of section 530, in that the dispute from which these proceedings are supposed to spring is not described as a dispute likely to induce a breach of the peace, and the learned Standing Counsel, who argued this case with great fairness and ability for the

Municipality, is in a manner forced to contend that the dispute described in section 532 may mean a dispute of any kind, being simply a claim made and denied, or a claim resisted, and he is unable, upon a question put to him, to suggest any limit on which the authority of the Magistrate to enquire into such disputes should stop.

It appears to us that without going so far as to say that the dispute which enables Magistrates to interfere under this section must be a dispute likely to induce a breach of the peace, it must at any rate be some substantial dispute, necessitating the interference in some way or other of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute.

Now, in this case it is clear there was no dispute between the Maharaja and any person until the head of the Municipality, who was himself the Magistrate, *proprio motu*, and, I may say, in a purely speculative way, took up the question whether there ought, or ought not, to be a public thoroughfare over this road. The evidence shows that no person had ever been obstructed; no person ever set up any claim to pass over this road otherwise than every one had hitherto been allowed to pass unobstructed over it. The questions which arose in the correspondence between the Magistrate and the Maharaja's Private Secretary related to a right which, so far as the evidence goes, had never been exercised, and never, in practice, claimed, *viz.*, that of passing over the road during the hours between sunset and sunrise. Now, this not being a question of public thoroughfare but a right-of-way, it is obvious that a right of a limited kind might very well grow up, and I think the owner of the ground, over which such a right-of-way existed, would be perfectly justified in taking, and would be wise to take, precautions that the existing right should not go further than it did exist as of right. Therefore, this so-called dispute being merely of a speculative kind, even if the Maharaja, on being applied to, declared his intention to prevent the right-of-way going beyond the mode in which it had hitherto been exercised, that did not constitute any dispute such as the Magistrate was entitled to take action upon.

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But, in addition to that, it appears to me that the case was not one in which the Magistrate had authority to make any order, because the section does not enable a Magistrate to make a purely declaratory order; it only enables him to prevent arbitrary interruption by any person of rights actually enjoyed, which have been exercised by the public or a person or class of persons. The only right in question here was a right of using this road during the night. There is no evidence whatever to show that any person had ever exercised, or claimed to exercise, the right of passing over this road during the night. As I said before, it is quite conceivable that there should be a limited right-of-way, that is to say, a right of passing over the road by day and not by night, and the evidence shows that that restricted kind of right has never been interfered with. This was not, therefore, a case in which the Magistrate was entitled to interfere. I think his order in this case was made without authority, and must be set aside.

The Deputy Commissioner, when examined in this case, stated very ingenuously, as it seems to me, that the reason why proceedings were taken in this particular form was, that the result would be to throw upon the Maharaja the costs of being plaintiff in the civil suit which it might be necessary to bring. That, of course, where the contending parties are both private individuals, is a very natural and justifiable course. But the propriety of it is not very clear where one of the parties is the Magistrate himself, in which case the conclusion in the Criminal Court may be said, without any imputation on the presiding officer, to have been somewhat of a foregone conclusion.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF TURIBULLAH AND OTHERS.

1879
May 5th.*Committal to Sessions Court—Irregularity—Prejudging defence to charge committed to Sessions Court.*No. 221 of
1879.

Upon the single charge of wrongful confinement preferred under section 342 of the Indian Penal Code before a Joint-Magistrate, the prisoners raised a defence justifying the confinement, on the ground that the persons confined had been caught by them under circumstances which led to the belief that they had committed house-breaking by night with intent to commit theft. Enquiry having been made, the Magistrate committed the prisoners, not only for wrongful confinement, but, disbelieving the defence, for fabricating false evidence, and for bringing a false charge. The prisoners were tried by the Sessions Judge, and found guilty on all three charges at one and the same time. *Held* that the conviction on the last two charges was illegal, as, by adding the additional charges, the Magistrate had really prejudged the defence to the first charge.

Where the Court, without having first heard the evidence for the prosecution, examines the witnesses for the defence, he commits an irregularity; but, if the prisoners are not materially prejudiced thereby, the conviction will not be set aside.

CRIMINAL APPEAL against a conviction passed by the Additional Sessions Judge of Backergunge.

The facts are these:—

The appellants, of whom there were five, were convicted, under section 342, of the offence of causing wrongful confinement, and each sentenced to one year's rigorous imprisonment. One of them, Naimuddi, was further sentenced, under the same section, to pay a fine of Rs. 50, of which a portion is awarded as compensation to two of the prosecutors. The last four of the prisoners were also convicted of fabricating false evidence and sentenced, Naimuddi to six years' rigorous imprisonment, and the other three to five years' rigorous imprisonment, and the sentence in each case was directed to take effect at the expiration of the

[CRIMINAL.]

C. L. R. 45.

1879

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Statement.

sentence that has been passed under the conviction for wrongful confinement.

The last four of the prisoners were also convicted of making a false charge under section 211, but no sentence has been passed in respect of that conviction.

It appears that the five prisoners were originally put upon their trial before the joint Magistrate on a charge of wrongfully confining three persons; and on that charge alone. The defence of the first prisoner was a denial of any participation in the offence. The other four prisoners denied that they had confined one of the three persons; and with regard to the remaining two, namely, Jaharuddi and Yasin, raised the defence that they had a lawful excuse for confining those two, inasmuch as they were caught in the house of one of the prisoners under circumstances which led to the belief that those two had committed house-breaking by night with intent to commit theft.

The Joint-Magistrate had full power under the Code to try the prisoners for the offence of wrongful confinement, but, instead of disposing of the case himself, committed the prisoners for trial before the Sessions Judge. In the course of the enquiry preliminary to the committal, the Joint-Magistrate went at great length into the question of the sufficiency of the defence pleaded by the four prisoners who justified the confinement of Jaharuddi and Yasin. He proceeded himself to the spot where the house-breaking was alleged to have occurred, and by his direction certain witnesses were examined with reference to the alleged house-breaking. He came to the conclusion that the defence was false, and in committing the prisoners for trial, not only committed them upon the charge of wrongful confinement, which was the sole charge before him, but also upon a second charge of fabricating false evidence, and upon a third charge of bringing a false charge with intent to injure. The second charge was based upon the view which the Magistrate took of the evidence adduced by the four prisoners to support the justification which they had pleaded as their defence to the wrongful confinement of Jaharuddi and Yasin. The third charge was grounded on the Magistrate's view of the falsehood of the charge of house-breaking which the four last

prisoners had preferred at the thannah against Jaharuddi and Yasin.

Báboo *Bhobun Mohun Doss*, for the prisoners.

1879

In re

TURIBULLAH.

Judgment.

After stating the facts as above, the judgment of the High Court (1) proceeded as follows:—

We think that the Magistrate, in sending up the four prisoners to be tried at one and the same time upon these three charges, committed a great error. The complaint laid before him by the prosecution related to the single offence of wrongful confinement. It was his plain duty, if he did not dispose of the case himself, to commit the prisoners for trial upon that charge alone, whatever his opinion might be of the sufficiency of the defence. To frame additional charges against the accused *ex mero motu* because the Magistrate disbelieved the defence, and to commit the accused for trial on all these charges at one and the same time, is a procedure unwarranted by the law, and a violation of the ordinary principles of fairness and justice that ought to prevail in criminal trials. Inasmuch as the Magistrate did not dispose himself of the charge of wrongful confinement, but forwarded it to the Sessions Court for trial, it is surprising that he did not perceive that, in putting the accused upon their trial in respect of the two additional charges, he was really prejudging the defence which they had raised to the first charge. It is also a matter for surprise that when the case came before the Additional Sessions Judge for disposal, the great impropriety and irregularity of the proceedings of the Joint-Magistrate did not attract the notice of the Judge. But he at once proceeded to try the prisoners upon all these three charges together; and in so doing committed, as we find from the statement in his judgment, a further irregularity, by commencing to examine the witnesses for the defence before he had heard the evidence for the prosecution. His reason for adopting this inversion of procedure is this, stated by himself, "because of the nature of the defence and of the charges against prisoners, who have admitted the seizure of some of the persons, with the illegal seizure of whom they are charged." The reason here stated is quite insufficient, even as regards the four accused who pleaded a justification.

1879

*In re*TURIBULLAHJudgment.

The prosecution had to make out, not only that the three persons were confined in point of fact, but that they were wrongfully confined; and this they must do by producing evidence, and it is only when sufficient evidence had been produced that the accused could be called upon to go into their defence. As regards the first prisoner, Turibullah, the reason is not only insufficient but has no application, for he did not join in the plea that was raised by the other four prisoners, but all along denied having had anything to do with the wrongful confinement.

The Additional Judge having commenced in this extremely irregular way with the evidence of the defence, then took the evidence for the prosecution, and arrived at the conclusion that the case for the prosecution was true and that for the defence false.

We are of opinion that the convictions thus obtained for fabricating false evidence and for bringing a false charge cannot stand.

With regard to the conviction under section 342, the vakeel for the prisoners admits that he is unable to show that the evidence does not warrant the conviction. We have, therefore, to consider whether the irregularities which have been committed in the course of the trial are such as to vitiate the conviction under that section and amount to a mis-trial. Although the "Additional" Judge, in dealing with the charge of wrongful confinement, commenced irregularly with the evidence of the defence, yet we think that, under the circumstances of this case, the prisoners were not materially prejudiced by this method of proceeding. The Judge and the assessors had, when the latter pronounced their opinion and the former his decision, the whole evidence for the prosecution, as well as that for the defence, before them. No less than ten witnesses were examined on the question of the alleged house-breaking by Jaharuddi and Yasin, several of the witnesses being those whom the four last prisoners had themselves summoned. We have no reason to believe that the witnesses called for the defence would have been believed by the Judge and the assessors if they had been called in their proper order, which was at the close of the evidence for the prosecution, or that the witnesses for the prosecution, who spoke to the wrongful confine-

ment, would not have been equally credited by the Judge and assessors if they had been called before the witnesses for the defence instead of after them.

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TURIBULLAH.
Judgment.

We, therefore, think that, while setting aside the convictions for fabricating false evidence and for preferring a false charge, and the sentence which has been passed for the former offence, we are in a position to affirm the conviction and sentence for causing wrongful confinement under section 342, which we accordingly do.

. . .

[CRIMINAL APPELLATE JURISDICTION.]

1879
June 10th

BHOOTNATH DEY, AND OTHERS APPELLANTS.

No. 244 of
1879.

Assessors—Trial by jury of offences some of which are triable with the aid of assessors—Criminal Procedure Code, Act X. of 1872, sections 233 Expl. and 263—Act III. of 1877, section 82—Procedure.

In a trial by a jury before a Court of Session upon charges some of which were triable by a jury and some with the aid of assessors, the jury by a majority of four to one, returned a verdict of "not guilty" on all the charges.

Held that it was not competent to the Judge, who disagreed with the verdict to treat the trial, so far as it dealt with the latter charges, as a trial with the aid of assessors, and concurring with the minority to convict and sentence the accused persons.

It was the duty of the Judge in such a case to have accepted the verdict as one of acquittal, and then to have passed orders in accordance with section 253 of the Code of Criminal Procedure.

Explanation to section 233 of the Code of Criminal Procedure discussed.

CRIMINAL APPEAL from a conviction passed by the Sessions Judge of Hooghly.

The prisoners in this case were committed by the Deputy Magistrate for forgery and for using a forged document as genuine under sections 467 and 471 of the Indian Penal Code. Further charges were added under section 82 of the Registration Act. Objections were raised in the lower Court against the addition of these charges, on the ground that no one had sanctioned the proceedings, as required by the Registration Act, but that objection was overruled.

The trial was conducted before a jury duly chosen by lot.

On the 7th March a majority of four to one returned a verdict of not guilty on all the charges. This verdict the Judge characterised as most perverse, and he thereupon intimated his intention of referring the case to the High Court under section 263 of the Code of Criminal Procedure, and directed the accused to be kept in custody pending reference to the High Court."

On the 10th of March the Judge having meanwhile had his attention drawn to the case of the *Empress vs. Mohin Chunder Rai*, I. L. R., 3 Cal. 765, called upon the accused to show cause why they should not be punished under section 82 of the Registration Act, the trial being treated, so far as it dealt with the charges under that Act, as a trial with the aid of assessors.

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BHOOTNATH
DEV.
Argument.

No cause was shown, and after several adjournments the Judge recorded his final judgment in which, treating the trial on the Registration Act charges as held with the aid of assessors, he concurred with the assessor who was in the minority, and convicted and sentenced all the accused to various periods of imprisonment. Against this conviction and sentence the prisoners all appealed.

Ghose, for Appellants.

Baboo Juggoanund Mookerjee (Junior Government Pleader), for the Crown.

Ghose.—According to the explanation to section 233 of the Criminal Procedure Code, if an offence triable with assessors be tried by a jury, the trial shall not on that ground merely be invalid. The verdict of acquittal therefore ought, under section 263, to have been entered, or the Judge, if he disagreed with the verdict, ought to have referred the case to the High Court for orders. The case not having been sent up to the High Court, the verdict must stand, even though the Judge disagreed with it.

The case of the *Empress vs. Mohim Chunder Rai*, I. L. R., 3 Cal. 765, is entirely different from the present case. There the prisoners were convicted.

Had the jury in this case convicted the prisoners, I might perhaps, on the authority of that case, have been allowed to appeal on the facts.

There is no authority for the proposition that a verdict of acquittal may be taken as the finding of assessors.

The Judge here has chosen to consider the trial, so far as it deals with the added charges, as a trial with the aid of assessors. Now, under section 262 of the Code, the opinion of each assessor must be given orally and recorded by the Court, That

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BHOOTNATH
DEV.Judgment.

was not done here. Then the jury here was a jury chosen by lot, whereas assessors are not so selected. Throughout the trial was undoubtedly treated as a trial by jury.

This anomaly has happened: on the same evidence the prisoners have been acquitted on the substantive charges, and convicted by the Judge on the minor added charges.

Baboo *Juggodanund Mookerjee*.—We have no objection to the trial being treated as a trial by jury, if we can treat the case now as a referred case.

[PRINSEP, J.—You cannot do so, for the Judge himself says it is unnecessary to refer the case.]

Baboo *Juggodanund Mookerjee*.—Having regard to the definition of the word “trial,” which in section 3 is stated to mean the proceedings taken in Court after a charge has been drawn up, and to include the punishment of the offender, the trial in this case was not finished until the Judge passed the final order which he made, treating the verdict of the jury as the finding of assessors. That being so, the explanation to section 233 does not apply here, and at any time before the end of the trial the Judge had power to treat the case as one trial with assessors.

[MITTER, J.—We have only to consider the words “tried by a jury” in the explanation. These words have reference to the time when the jury have discharged their duty by returning their verdict, but the word “trial,” following, no doubt, includes the judgment of the Court.]

Ghose, in reply.—So far as the functions of the jury were concerned, the trial was at an end when it delivered its verdict. The case was then “tried by a jury” within the meaning of the words used in the explanation to section 233, and it only remained that the Judge should, under section 263, accept the verdict and pass judgment accordingly, or, if he disagreed therewith, refer the matter to the High Court.

The following judgments were delivered by the High Court (1):—

MITTER, J. MITTER, J. :—

In this case the prisoners were tried in the lower Court for

(1) MITTER and PRINSEP, JJ.

the offences described in sections 467 and 471 of the Indian Penal Code and section 82 of the present Registration Act. The trial was held by jury. On the 7th March 1879 a majority of the jury (four out of five) returned a verdict of "not guilty" under all these sections. The Sessions Judge recorded the following order: "I cannot agree with the majority. I think it a most perverse verdict. I must refer the case to the High Court." The Judge accordingly directed that all the accused should be kept in "custody pending a reference to the High Court."

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DEY.
Judgment.
MITTER, J.

The Judge's attention having been subsequently drawn to a case in *L. L. R.*, 3 Cal. 765, he called upon the pleaders of the accused persons on the 10th March 1879 to show cause why they should not be punished under section 82 of the Registration Act, the trial being considered as having been held with the aid of assessors. It appears that, under section 233 of the Criminal Procedure Code, an offence under section 82 of the Registration Act is triable with the aid of assessors. The case was postponed from time to time, and on the 28th March 1879, no cause being shown, the Sessions Judge recording his judgment, treating the trial, so far as the charge under section 82 of the Registration Act is concerned, as a trial held with the aid of assessors, and concurring with one of them, *i.e.*, with the juror who constituted the minority, convicted the prisoners, under that section, and sentenced them to various periods of imprisonment.

Against this conviction and sentence this appeal has been preferred, and the main contention before us is, that the Sessions Judge is wholly wrong in treating the trial as having been held with the aid of assessors. In support of this contention the learned counsel who appears for the appellants strongly relies upon the explanation of section 233. We think that this contention is valid. The explanation says: "If an offence triable with assessors is tried by a jury, the trial shall not on that ground merely be invalid." It further goes on to state: "If an offence triable by a jury is tried with assessors, the trial shall not on that ground merely be invalid, unless objection be taken before the Court records its finding."

It appears to me clear that under the first part of this explanation the Sessions Judge should have treated the trial as valid,

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BHOOTNATH
DRY.
Judgment.
MITTER, J. and proceeded to record final order in accordance with section 263 of the Criminal Procedure Code.

It has been contended before us, on behalf of the Crown, that as the error was discovered before the trial was completed (because it was discovered before the Sessions Judge recorded his final order in the case), the explanation in question does not apply; but we think that in the language of the explanation the case was "tried by a jury," inasmuch as all that the jury had to do in the matter was done when they returned their verdict. On this ground, therefore, I think that the sentence that has been passed in this case is erroneous, and I would quash the conviction and set aside the sentence.

The Sessions Judge must proceed in the case in accordance with section 263 of the Code. I would remand the case to the Sessions Judge, who must accept the verdict of the jury as one of acquittal, and then pass orders in accordance with section 263.

PRINSEP, J. PRINSEP, J. :—

I entirely concur in the judgment that has just been delivered. I would only add that it was not competent to the Sessions Judge to treat the trial, as regards the offence under section 82 of the Registration Act, as one held with the aid of assessors. There is nothing on the whole of the proceedings, until his memorandum was recorded on the 10th March 1879, that is, three days after the trial had been completed, except so far as the Sessions Judge was personally concerned, and after he had expressed his intention to submit the case to this Court under section 263, because he disagreed with the verdict of the jury, that contains any reference to a trial with assessors. The trial was throughout conducted as a trial by jury.

The law requires that, in a trial held with the aid of assessors, at its completion, the Sessions Judge should take the opinion of each assessor orally, and should record it in writing, and that he should then consider those opinions and pass judgment accordingly, as he might think fit. Now, in this case, there is nothing to show what the opinions of the assessors individually were. All that is on record is a verdict, recorded as one of a jury, showing

that four out of five of the persons sitting on the trial considered the prisoners to be not guilty.

It has been held more than once by this Court that the opinions of the assessors should contain more than this; that it should contain the grounds on which their opinions are based. The prisoners would be entitled to insist that the Sessions Judge should take such opinions into his consideration before he forms and expresses his own opinion, before the case could be treated as a trial held with the aid of assessors. In other respects, I entirely concur with the judgment of my learned brother MITTER and with the order which he proposes to pass.

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[CRIMINAL JURISDICTION.] . .

SHURUT CHUNDER BANERJEE AND } PETITIONERS;
OTHERS }

AND

BAMA CHURN MOOKERJEE OPPOSITE PARTY.

March 19th.

No. 113 of
1879.

Criminal Procedure Code (Act X. of 1872), section 518—Haut; Removal of, to a distance—Jurisdiction.

Where a Magistrate made an order under section 518 of the Code of Criminal Procedure (Act X. of 1872), directing one of two rival haut proprietors to remove his haut to such a distance as to render it useless for the purposes for which it was established, it was held that the order came within the purview of the Full Bench decision of *Gopi Mohun Moulik vs. Taramoni Chowdhani*, 4 C. L. R. 309, and might be set aside as in excess of jurisdiction.

RULE to show cause why an order, passed by the Deputy Magistrate of Ahipore, dated 29th March 1879, should not be set aside.

The proceedings in this case were instituted upon a petition filed by the complainant Bama Churn Mookerjee, praying for an order to restrain Shurut Chunder Banerjee, Jogendronath Halder, and Nogendronath Halder from holding a haut, recently established by them opposite and in close proximity to his haut, which had been in existence for 11 years.

The order was prayed for on the ground that the defendants had been resorting to force in order to compel people to give their

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patronage to their haut rather than to the older haut, and that, in consequence of such force being used, serious riots and affrays had taken place, and more serious riots might be apprehended.

These hauts, which were situated close to Kalighat, by the temple of Kali, are kept chiefly for the purpose of supplying goats, kids, and other things necessary for sacrifices to the idol. The temple itself is much frequented by pilgrims and others, and at all times there is a large concourse of people about it.

From the evidence taken before the Magistrate, it seems that, in spite of the fact that close to the temple a strong body of police was constantly located, there had been several breaches of the peace committed since the opening of the new haut. It also appeared that the proprietors of that haut had been employing *lattials*.

Upon these facts the Deputy Magistrate, on the 29th March, under section 518 of the Code of Criminal Procedure (Act X. of 1872), made the order complained of, directing the owners of the new haut to desist from holding their haut on its new site, and to remove it within one week to a distance of 20 russees (nearly half a mile).

The effect of this order for removal to such a distance from the temple was to entirely destroy defendants' haut. Subsequently, they applied to the High Court, and obtained a rule calling upon the Deputy Magistrate and the complainant to show cause why the order should not be set aside.

Mr. Ghose showed cause.

Baboo Ashootosh Mookerjee, contra.

Ghose.—This Court has no jurisdiction to interfere in this case, the Magistrate having stated that a riot or an affray being imminent, he considered it necessary to make the order complained of under section 518.

[WHITE, J.—But, under the recent Full Bench decision, the order of the Magistrate is bad, and we can set it aside.]

That may be in a civil case, but it does not decide the question whether this Court can interfere in its revisional jurisdiction. The power of interference as a Criminal Court is expressly taken

away by the Legislature enacting that orders passed under section 518 are not judicial proceedings.

[WHITE, J.—But under the Charter we can set aside an order which the Magistrate had no power to make.]

It has been decided by a Full Bench of five Judges that this Court cannot interfere in such a case under section 15 of the Charter Act.—*In the Matter of Chunder Nath Sein*, 1. L. R., 2 Cal. 293.

[WHITE, J.—That case was considered by all the Judges in the recent Full Bench case, and that does not prevent our interfering when the order is without jurisdiction.]

It is difficult to distinguish that case from the present; there also the order was for all time.

[WHITE, J.—We must be guided by the more recent decision, which lays down that a Magistrate has no power to make such an order for an indefinite period.]

Unless your Lordships consider that the case of *Chunder Nath Sein* has been practically overruled, I submit that this Court cannot interfere, either under section 297 or under section 15 of the Charter Act. The Magistrate is competent to pass such an order, provided he is satisfied that the preservation of the public peace renders it necessary. In this case, the Magistrate has come to a finding upon evidence, and he gave the other side an opportunity to show cause, but they declined to adduce any evidence.

[WHITE, J.—The Magistrate cannot say that a man shall not do what he has a clear right to do. He has practically directed the closing of the shop of the opposite side.]

It is difficult to conceive a valid order under this section by a Magistrate if your Lordships hold that the Magistrate had no power to direct what he has done in this case. The terms of section 518 are very wide.

Baboo *Ashootosh Mookerjee* was not called upon.

The judgment of the High Court (1) was as follows:—

We think that the order of the Magistrate comes within the purview of the late Full Bench order (*Gopi Mohun Moulick vs.*

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Taramoni Chowdhurani, 4 C. L. R. 309), and that the Magistrate has acted in excess of jurisdiction. He has given an order, which will be in effect for all time, for the removal of the hant to such a distance elsewhere as to render it of no use to the applicant. The rule is made absolute.

Judgment.

[CRIMINAL REFERENCE.]

April 3rd. NUSIBUNNISSA BIBEE
AND
No. 692 of 1879. SHEIKH ERAD ALI

Criminal Procedure Code (Act X. of 1872), sections 147 and 467—Penal Code, sections 211, 182, and 500—Sanction to prosecute.

A charge of theft was made before the police, and while inquiries, which afterwards resulted in the charge being found by the police not to be proved, were pending, the charge was repeated in a complaint before the Magistrate of the District, by whom the matter was handed over to the Sub-Deputy Magistrate, who reported the charge as false. Whereupon the Magistrate directed the police to enter the charge as false, but without ordering the formal dismissal of the petition of the complainant.

On the application of the accused, a counter-prosecution, under sections 211, 182, and 500 of the Penal Code, was then sanctioned, and the case sent to the Deputy Magistrate for trial. That officer discharged the accused on the ground that the sanction of the Magistrate was illegal, as there had been, he alleged, (1) no judicial investigation as to the original charge; (2) no formal dismissal of the complaint; and (3) the witnesses produced by the complainant had not been all examined.

Held that the Deputy Magistrate was bound to accept the sanction made by a superior Court as valid, and to leave the accused to question it before a competent Court if so advised; that a prosecution may be maintained in respect of a false charge made to the police, or contained in a complaint which has been dismissed under section 147 of the Criminal Procedure Code, although there has been no judicial investigation, and that accordingly the Deputy Magistrate ought to have tried the charge before him.

REFERENCE from the Officiating Magistrate of Howrah.

One Erad Ali laid a charge of theft of a necklace in the police-station against one Nusibun Bibee. The police on inquiry

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reported that the case was not proved. Before receipt of the police reports the District Magistrate, on a complaint of Erad Ali preferred to him, directed that the complainant should bring his witnesses to prove the charge, and forwarded all the police papers and the petition to the Sub-Deputy Magistrate for his opinion after examination of the witnesses. The Sub-Deputy Magistrate reported the case false, on which the District Magistrate passed an order on the back of the police report "Show as false." It does not appear whether he formally dismissed the charge. The accused Nusibun then applied to the Magistrate for permission to prosecute Erad Ali for bringing a false charge and for defamation, on which the Magistrate sanctioned the prosecution under section 211 and 182 P. C., summoned the accused; and made over the case to the Deputy Magistrate, Pundit Srish Chunder Veydarutna for trial. The Deputy Magistrate, on hearing both sides, discharged the accused on the following grounds: *1st*, that the sanction to prosecution under sections 211 and 182 was illegal, inasmuch as there was no judicial investigation into the charge of theft originally made by the accused; *2ndly*, that the Magistrate did not pass the formal order of dismissal on the petition of Erad Ali; and, *3rdly*, that the Sub-Deputy Magistrate did not hear all the witnesses produced by Erad Ali, as he should have done, before pronouncing his complaint to be a false one.

Under these circumstances, the Magistrate referred the matter to the High Court as he was of opinion that the order of the Deputy Magistrate should be set aside for the following reasons stated by him as follows:—

1st.—That no sanction, under section 468, Act X. of 1872, was necessary when the original charge was preferred to a police-officer, *vide* 25 W. R., page 33.

and.—That the offence under section 211 consists in the making of the charge and not in prosecuting it; no judicial inquiry into the charge was, therefore, necessary, *vide* I. L. R., 1 All. Series 497.

3rd.—That the prosecution was not pending when the sanction was accorded by the District Magistrate to prosecute under sections 211 and 182 of the Penal Code.

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4th.—That whatever may have been the nature of the inquiry to test the truth or falsehood of the original case, whether that inquiry is said to be full and ample or meagre and insufficient, I think that when after making it the Magistrate pronounced the original case false, and referred the present complainant's charge, under sections 182 and 211, to the Deputy Magistrate for trial, the said Deputy Magistrate was bound to come to a finding on the merits of this second case, and not discharge the defendant on a legal technicality.

5th.—No sanction to prosecution under section 500 was necessary.

The judgment of the Court (1), after stating the facts above set out, proceeded as follows :—

We think the Deputy Magistrate was wrong to question the sanction given by the Magistrate. It was an order made by a superior Court, purporting to be made under a particular provision of law. Whether it was rightly or wrongly made was not for the Subordinate Court to inquire into. The Deputy Magistrate was not sitting as a Court of appeal or revision to examine the mode in which the Magistrate of the district had dealt with the case in which he had sanctioned a prosecution under section 211 of the Penal Code. He was bound to accept the sanction as valid, and leave the accused to question it before a competent Court if so advised.

But the Deputy Magistrate was not only wrong in this; in our opinion he was wrong on both the first and third of the grounds taken by him.

A prosecution may be maintained in respect of false charges made to the police, or contained in a complaint which has been dismissed under section 147, Criminal Procedure Code, although there has been no judicial investigation, though where the accused has been brought before a Court, it is wrong to throw out the charge against him summarily, and not to complete the inquiry set on foot by the issue of a summons or warrant for his appearance. If it were otherwise, complaints dismissed under section 147 could never be the subject of a prosecution, yet there is no warrant for

(1) AINSLIE and BROUGHTON, JJ.

saying that the offence, provided for under section 211, is not committed simply because it happens to be innocuous to the person intended to be injured.

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And as to the third ground, the Deputy Magistrate is clearly wrong in treating the preliminary inquiry by the Sub-Deputy Magistrate, which was held under the provisions of section 146, as a trial subject to the rules in Chapters XVI. and XVII. of the Code of Procedure. The reported cases cited by him refer to *trials* and have no bearing on the present case.

But, even if the District Magistrate was in error in sanctioning a prosecution under section 211 in respect of the complaint before himself, and as to this we think he did err, inasmuch as the departmental order to the police to "show the case as false" was not a formal dismissal of the complaint under section 147, this complaint, as far as we can see from this record, is still pending, in the sense that no order has been made on it as against the complainant, yet there were before the Deputy Magistrate several charges he was bound to consider.

The complaint included a charge under section 500. The summons was under sections 182 and 211 P. C.

Now, as regards the charge under section 182, there was the sanction required under section 467, Criminal Procedure Code, and the charge under section 211 P. C. would cover the charge made at the police-station, in respect of which no sanction is required (see 25 W. R. 33), as well as the charge made directly to the Magistrate requiring sanction under section 468.

We cancel the order of the Deputy Magistrate, and direct him to try the accused on the charges before him.

[CRIMINAL JURISDICTION.]

May 10th.

EMPRESS *vs.* FELIX MAQUIRE.No. $\frac{67}{84}$.

Mutiny Act (41 Vic., cap. 10), section 101—Andaman and Nicobar Islands, Jurisdiction of Criminal Courts in—European British subjects.

Section 101 of the Mutiny Act (41 Vic., cap. 10) does not deprive the Criminal Courts of jurisdiction over British soldiers committing offences within the territorial limits of these Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief.

THIS was a reference under section 296 of Act X. of 1872, and section 13 of the Andaman and Nicobar Islands Regulation of 1876, from the Sessions Judge and Chief Commissioner of the Andaman and Nicobar Islands, under the following circumstances:—

One Felix Maquire, a private of the 89th Foot, was committed for theft, by the First Assistant Superintendent, to the Court of the Sessions Judge, the commitment having been made without any communication having taken place upon the subject with His Excellency the Commander-in-Chief. The Sessions Judge was of opinion that under the 101st section of the Mutiny Act (41 Vic., cap. 10) the committing Magistrate could not exercise jurisdiction in the case independently of the sanction of the Commander-in-Chief, and accordingly referred the matter to the High Court.

The judgment of the High Court (1) upon the reference was as follows:—

We have referred to the 101st section of the Mutiny Act (41

Vic., cap. 10, A. D. 1878), and are of opinion that that section (which is also to be found in the Mutiny Acts between 1873 and 1878) does not deprive the Criminal Courts of jurisdiction over British soldiers committing offences within the territorial limits of these Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief.

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—

The 101st section simply provides that, as regards criminal offences committed by British soldiers serving in India or its dependencies, and at a distance of more than 120 miles from the presidency towns, the offenders *may* be tried by a General Court-martial, the appointment of which rests with the Commander-in-Chief. It appears to us that the section is merely permissive of a military trial being held. In this case the Court has got possession of the investigation of the offence, and the Military Authorities have not availed themselves of the alternative procedure of trying the offender by a General Court-martial.

Under these circumstances, we think that the Court of the First Assistant Superintendent was a competent Court to commit the accused for trial on a charge of theft, and that the Court of the Sessions Judge and Chief Commissioner is a competent Court to deal with the case so committed, and we accordingly direct the latter Court to dispose of the case.

• • Not. — The Andaman and Nicobar Islands Regulation, III. of 1876, provides:—

Section 13, clause (c). The functions of the High Court as a Court of Reference shall be discharged by the Governor-General in Council.

Clause (d). The functions of the High Court as a Court of Revision shall be discharged in respect of proceedings of the Court of Session by the Governor-General in Council, and in respect of Courts subordinate to the Court of Session by the Court of Session.

Clause (e). All other functions of the High Court shall be discharged by the Court of Session.

* * * * *

Clauses (d) and (e) of this section shall not apply to proceedings against European British subjects, or persons jointly charged with European British subjects.

[CRIMINAL REVISIONAL JURISDICTION.]

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June 12th.No. 126 of
1879.

BURODA KANT ROY PETITIONER;

AND

KORIMUDDI MOONSHEE AND OTHERS

Criminal Procedure Code (Act X. of 1872), sections 328 and 491—Evidence recorded partly by one Magistrate and partly by another.

Notwithstanding the introduction into the section of the words "the accused person" and "conviction," the provisions of section 328 of the Criminal Procedure Code apply to an inquiry instituted under section 491 with a view to enforcing the giving of security against a breach of the peace, and in such a case, where the Magistrate, by whom only part of the evidence has been taken, is succeeded by another Magistrate while such inquiry is pending, the person called upon to show cause why he should not give security may insist, before the latter, upon the recall and re-examination of the witnesses whose evidence has been already taken by the former Magistrate.

IN this case the petitioner moved the High Court, under the circumstance which will be found set out in the judgment of that Court, to set aside an order made under section 491 of the Code of Criminal Procedure.

Baboo *Doorga Mohun Dass* appeared for the Petitioner.

The judgment of the Court (1), which was as follows, was delivered by—

WHITE, J. WHITE, J. :—

THIS is an application to set aside an order, made under section 491 of the Criminal Procedure Code, directing Buroda Kant Roy to give security against a breach of the peace. A summons under that section was issued by a Deputy Magistrate named Baboo Kristo Chunder Roy, and he examined three witnesses, and the case had arrived at the stage at which the petitioner had to be called upon to show cause, when Baboo Kristo Chunder

Roy was transferred, and the present Deputy Magistrate was appointed in his place. Afterwards Buroda Kant Roy, who had been duly summoned to show cause, appeared by his mookhtear, and applied that the witnesses for the prosecution should be re-summoned and re-heard under section 328. This request the present incumbent in office did not comply with, but proceeded to hear the defence without re-summoning and re-hearing the witnesses, and then made the order complained of.

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The petitioner urges that the order should be set aside, on the ground that the requirements of section 328 of the Criminal Procedure Code have been disregarded.

The Deputy Magistrate in his explanation says that "Buroda Kant Roy's mookhtear might have asked me to re-summon and re-hear the witnesses, but I do not remember that he did so."

The Deputy Magistrate having no recollection on the subject, we think we must give effect to the affidavit of the petitioner, and hold that the application was made and refused. And the probability is strongly in favour of our conclusion; for it appears from the further explanation offered by the Deputy Magistrate that he considered that the application was not one which the petitioner was entitled to make, for the Deputy Magistrate says that section 328, according to the view which he takes of it, does not apply to the case of an inquiry into the giving of security, because the words used in the first proviso are "the accused person," and in the second proviso "conviction."

The first observation that arises upon the above explanation is this: If section 328 did not apply to the case then, before the Deputy Magistrate, it was his duty, according to the ordinary principles which regulate the adjudication upon evidence and the administration of justice, to recall the witnesses himself; and to take their evidence again from the beginning. He could only be relieved from performing that duty on the ground that section 328 of the Code of Criminal Procedure applied to the case before him. We think, however, that section 328, notwithstanding the introduction of the words referred to by the Magistrate as a reason for a contrary construction, does not really apply as much to an inquiry having in view the giving of security against a

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WHITE, J.

breach of the peace as to a trial of a party who may be accused of an offence. In the body of the section the direction is general, that the Magistrate is to adopt the procedure prescribed in that section whenever a case is before him in which part of the evidence has been heard by his predecessor. Section 491 directs that an inquiry into giving security shall be adjudicated upon evidence. Upon such an inquiry, the party brought before the Magistrate is in substance "accused" of being likely to commit a breach of the peace, or of doing an act which is likely to produce a breach of the peace. And if the Magistrate finds that he is, the order which the Magistrate makes, directing him to give security, is in substance a conviction, though different in its form and effect. The reasons for adopting the procedure of section 328, when there has been a change of officers pending the inquiry, are just as strong in the case of an inquiry into giving security as they are in the case of an inquiry into an offence. And I may repeat that the only result of our coming to the conclusion that section 328 does not apply to a case like the present one would simply be to compel the Magistrate in this and all similar cases to commence the inquiry afresh. We are, therefore, of opinion that section 328 did apply, and that the Magistrate was bound in this case, upon a demand by Buroda Kant Roy, to re-summon and re-hear the witnesses who had been heard by his predecessor, and that not having been done, his adjudication of the case is not in accordance with the provisions provided by the Criminal Procedure Code.

The rule is made absolute, and the Magistrate's order is set aside.

[CRIMINAL REVISIONAL JURISDICTION.]

CHUNDER MADHUB GHOSE June 27th.
 AND No. 115 of
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 JUGGUT CHUNDER SEN

*Criminal Procedure Code (Act X. of 1872), section 530—Proceeding based upon
 insufficient materials—Jurisdiction.*

Where the proceeding recorded by a Magistrate, under section 530 of the Criminal Procedure Code, is based on materials which do not disclose sufficient ground for considering that a breach of the peace is imminent, an order calling upon the parties concerned in the dispute to attend in Court, and give in a written statement of their respective claims, in respect of the fact of actual possession of the subject of dispute, may be set aside as made without jurisdiction.

THIS was an application, under section 297 of the Criminal Procedure Code, to set aside an order of the Deputy Magistrate of Baghat in the district of Jessore, instituting a proceeding under section 530 of the Criminal Procedure Code.

In 1878, the petitioner, Chunder Madhub Ghose, at a sale in execution of a decree, purchased the right and interest of Messrs. Morell and Lightfoot in a mehal called Betiboonia, situated in the sub-division of Baghat. The sale was duly confirmed, and the purchaser put in possession, on the 23rd August 1878. A

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cutcherry was erected, and endeavours were made to realize the rents from the ryots.

On the 29th January 1879, one Babooram Samadâr presented a petition to the Deputy Magistrate, alleging that his masters had, in 1281, obtained an *ousat* talookdaree pottah of the mehal from Messrs. Morell and Lightfoot, and were in possession and in receipt of rent from the tenants. The petition further suggested that the servants of Chunder Madhub Ghose had ill-treated the ryots, and that, in the event of their being opposed, there was a probability of a breach of the peace occurring.

The police were, thereupon, directed to make an inquiry, and on the 3rd February they reported that, although no breach of the peace had taken place, it was possible such a breach might happen, and recommended both parties to be bound down to keep the peace.

Accordingly, on the 17th March, proceedings were instituted under section 491 of the Criminal Procedure Code.

But the Deputy Magistrate, after recording certain evidence in these proceedings, on the same day, made an order calling upon both parties under section 530 to appear on the 2nd April, and produce their evidence before him in a proceeding which he thereupon instituted under that section. This proceeding set out that "it appears from the report of the police that both parties have commenced a quarrel with regard to kismut Betiboonia, and that there is a likelihood of a breach of the peace in the future."

The first proceedings, instituted under section 491, resulted, on the 22nd March, in five of the servants of the present petitioner being bound down to keep the peace, but on appeal, the Magistrate of Jessore set the order of the Deputy Magistrate aside, on the ground that the evidence did not prove the likelihood of a breach of the peace.

An application was then made, on behalf of Chunder Madhub Ghose, to have the proceedings under section 530 transferred to another Magistrate; but this was refused by the Magistrate. Whereupon the petitioner applied to the High Court to have the order directing the proceedings under section 530 set aside, on the ground that the materials on which it was based did not disclose that either party had done anything, or was about to

do anything, likely to cause a breach of the peace. A rule to show cause was granted, and now came on for hearing.

Baboo *Kashi Kant Sen*, showed cause.

M. Ghose, Baboo *Umbika Churn Bose*, and Baboo *Doorga Mohun Dass*, contra.

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Baboo *Kashi Kant Sen*.—Under the new Code of Criminal Procedure, a Magistrate may record a proceeding on a police report, or any other information, and is not bound to take evidence, although in a recognizance case he cannot bind any one without recording evidence. The two cases are, therefore, quite distinct. It does not follow, therefore, that because the Magistrate of the district has held that the evidence recorded by the Deputy Magistrate was insufficient to support the order for recognizance, that evidence is insufficient to satisfy the Deputy Magistrate for the purpose prescribed in section 530.

[WHITE, J.—You mean that an order for recognizance cannot be made except upon evidence; but under the explanation to section 530, a Magistrate may act upon any private report, and need not act upon any evidence; and that if the Magistrate says he is satisfied that a breach of the peace is likely, we cannot go behind it.]

Yes; it has been held that a Magistrate, in a case under section 530, is not bound to take evidence—*In the Matter of J. D. Sutherland*, 9 B. L. R. 229. In this case the Deputy Magistrate has recorded a proceeding, and that is a sufficient compliance with the requirements of the section. Even if this Court has the power of going behind the proceeding, I submit that the police report and the statements of the parties are sufficient to show that there might be a breach of the peace at any moment.

Ghose (in support of the rule).—A Magistrate has no jurisdiction to interfere in cases of this kind, unless he has acquired it by recording a proceeding upon sufficient materials, stating that he is satisfied that a breach of the peace is imminent.

[WHITE, J.—He has recorded a proceeding, and he says he is satisfied. How can we go behind that?]

He must be satisfied upon sufficient and proper grounds, and the grounds ought to appear on the face of the proceeding. Here the

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proceeding simply states that "it appears from the evidence in the recognizance case, the police report and the statements of the parties, that a breach of the peace is likely," and I submit that such a proceeding is bad, inasmuch as it does not contain any grounds.

[WHITE, J.—The Magistrate refers to the record in the recognizance case, and I think we must take that record as substantially forming a part of this proceeding.]

Even then I contend that the materials and grounds referred to are insufficient.

[WHITE, J.—How can we go into that?]

The object of recording a proceeding containing the Magistrate's grounds is simply to enable this Court, as a Court of revision, to see that the Magistrate has not arbitrarily interfered in disputes which ought ordinarily to be settled by the Civil Courts—*Per GARTH, C. J., in Sheikh Munglo vs. Durganarain Nag*, 25 W. R., Cr. Rule., 76. I do not go the length of saying that the materials must be based upon evidence on oath, but they must be of such a character as to lead reasonably to the belief that, unless the Magistrate mean to interfere, a breach of the peace will be inevitable. This was the view taken by Mr. Justice PHEAR in the Matter of *Kishoree Mohun Roy*, 19 W. R., Cr. Rule., 10, and there his Lordship explains what he meant to say in an earlier decision which was dissented from by Sir RICHARD COUCH in the case cited by the other side.

[WHITE, J.—Are not the admitted facts of the case, *viz.*, that you are trying to realize rents from the ryots, that you have erected a cutcherry for that purpose, and that the other side have set up an under-tenure which you dispute, sufficient to lead to the inference that a breach of the peace is likely? Cannot a Magistrate, knowing the character and tendencies of the people, say that such facts satisfy him that a dispute likely to induce a breach of the peace exists?]

I submit not; otherwise a Magistrate may interfere in the case of every dispute, for of all disputes regarding land, a Magistrate may say in one sense that a breach of the peace is possible. In the present case the ryots are paying us willingly, and we are holding our cutcherry in the house of a ryot with his consent. It must be shown that we have done

some act or acts which are calculated to lead to a certain breach of the peace. I contend that, although the Magistrate may be satisfied upon statements or information not on oath, those statements must be similar in character and effect as would be necessary in order to bind down a person under section 491, because the words there are also "any person likely to commit a breach of the peace."

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Judgment.

[WHITE, J.—That section has reference to "a person," but section 530 refers to "a dispute."]

Yes, but the words are "all parties concerned in *such* dispute," that is, a dispute likely to lead to a breach of the peace. Therefore, what must be shown as regards "a person" in a case under section 491 must also be shown as regards "parties concerned in a dispute" in a case under section 530. Now, it has been held in two cases in 22 W. R. 79, that the accused must have done, or must have been contemplating, some specific act before he could be bound down under section 491. Those decisions, I submit, are applicable to the present case, the only difference between the two classes of cases being, that in the one evidence must be recorded on oath, and in the other it need not be so. If, then, the materials are in the present case insufficient, the Magistrate has acted without jurisdiction, and his proceeding ought to be quashed.

The following judgments were delivered by the Court (1) :—

MORRIS, J. :—

MORRIS, J.

The petitioner, Chunder Madhub Ghose, asks this Court to set aside a proceeding of the Deputy Magistrate of Baghat, dated March 17th, 1879, which he has recorded under the provisions of section 530 of the Criminal Procedure Code. In this proceeding he records the fact that a dispute exists, which is likely to induce a breach of the peace between Juggut Chunder Sen and one Chunder Madhub Ghose relative to certain land called Betiboonia, and he calls upon them to give in, within a specified time, a written statement of their respective claims as respects the fact of actual possession of the land in dispute. The peti-

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tioner seeks relief on the ground that this proceeding is uncalled for, and without jurisdiction.

The circumstances of the case are as follow: On the 4th March 1874, a certain property of the Messrs. Morell, named mehal Betiboonia, was sold in execution of a decree of the Civil Court, and purchased by Chunder Madhub Ghose. On the 23rd August 1878, Chunder Madhub Ghose was put in possession by the Court. On the 21st January 1879 one Babooram Samadar, a servant of Juggut Chunder Sen, presented a petition to the Deputy Magistrate of Baghat; representing that his master obtained mehal Betiboonia as an *ousut* talook tenure under a lease granted to him by the Messrs. Morell in 1871, and had been in possession and in the receipt of rent from the ryots since that date; that Chunder Madhub Ghose purchased the proprietary rights of the Messrs. Morell in this property at an execution-sale on Phalagoon 21st, 1284, that he had sent servants and lattyals, who were seizing the ryots and committing various kinds of oppression upon them, that if on the part of his master, opposition was offered for the protection of the ryots, an affray would probably take place, and he, therefore, prayed that securities and recognizances in heavy sums might be taken from certain servants of Chunder Madhub Ghose, whom he named.

Upon this the Deputy Magistrate called for a report from the police, and on the receipt of their report he, on February 13th, 1879, issued summonses on the persons named, calling on them to show cause why they should not be bound down, in various specified sums, to keep the peace. On their showing cause, the Deputy Magistrate, on the 17th March 1879, recorded the proceeding under section 530, which is now objected to, and on the 22nd March, he bound the persons down in heavy recognizances to keep the peace. The persons so bound down appealed to the District Magistrate, and he set aside the order on the ground that the evidence upon which the Deputy Magistrate had adjudicated did not prove that these persons were likely to commit a breach of the peace. As the Deputy Magistrate did not on this stay further proceedings under section 530, and the District Magistrate had no authority to interfere with his action under that section, the petitioner applies to this Court to restrain him by

cancelling the initial proceeding of March 19th. The petitioner contends that there are no grounds for that proceeding, as the information or evidence on which it is based is precisely the same as that upon which his servants were bound down to keep the peace, and in respect to which the Magistrate has held that it does not suffice to prove that they were likely to commit a breach of the peace. We observe, however, that what may satisfy a Magistrate that a dispute likely to induce a breach of the peace exists concerning any land which justifies his taking action under section 530 is very different from the evidence necessary to warrant an order under section 491, which bears upon the conduct of the particular person affected by it. It is necessary, therefore, to see what are the grounds stated in the proceeding of March 17th which have satisfied the Deputy Magistrate that a dispute likely to induce a breach of the peace existed concerning mehal Betiboonia. Unfortunately, in this proceeding, the Deputy Magistrate has not recorded any specific grounds. He refers to the statements of the parties, the evidence of the witnesses and the police report, and states that they satisfy him that a dispute likely to induce a breach of the peace exists concerning this property. We have had these statements, &c., read to us, and certainly no hostile act, or even hostile intention, on the part of either side can be gathered from them. The District Magistrate was perfectly right in holding that upon such evidence no person could be bound down to keep the peace. What these statements, evidence, and report amount to is this—that each party lays claim to the direct receipt of rent from the ryots; that, since his purchase, Chunder Madhub Ghose has made use of one of the houses of his tenants which the tenant has given him for the purpose of a cutcherry; that he is inducing the ryots to pay their rent to him; and that while the first kist of the year has been paid to Juggut Chunder, the second has been paid to Chunder Madhub Ghose.

There can be no question that, at present, the attitude of both sides is peaceful, and that each is acting within his own supposed right; no attempt at compulsion is exercised on the ryots in the matter of the payment of the rent, each party being content to take such rent as the tenants choose to pay him. Two

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questions here arise, *1st*, whether, in such a state of things as this, there are any proper grounds which would justify a Magistrate recording a proceeding, and taking action under section 530; and, *and*, whether he is justified in recording such a proceeding unless there is an immediate prospect of a breach of the peace arising out of the dispute in question. We think that the rulings of this Court go to show that both these questions must be answered in the negative. The case of *Rajah Run Bahadoor vs. Ranee Tilessuree Kooer*, reported in 22 W. R. 79, was somewhat similar to the present, though there the disputes had assumed a far graver complexion. In it the principle was affirmed that there must be some specific hostile act on the part of one of the parties going to show that a breach of the peace is probable. A Criminal Court would not interfere when the acts committed were honest acts done in assertion of a supposed claim of right, and which did not, in themselves, indicate an intention of afterwards proceeding to criminal conduct in the shape of a breach of the peace. Again, a Full Bench of this Court, *In re Sheikh Mungle vs. Doorga Narain Nag*, 25 W. R. 74, distinctly held that, however serious the dispute may be between the claimants, and however desirable the Magistrate may consider it to settle that dispute, he has no right to interfere, unless a breach of the peace is *imminent*. Here, not only is there no act on the part of either side from which any hostile intention may be drawn, but the Deputy Magistrate has expressly recorded that it is to guard against a breach of the peace "in the future" that he takes action under section 530; clearly no immediate probability of a breach of the peace is contemplated by him. In both these points of view, therefore, we are of opinion that the Deputy Magistrate's proceeding is bad, as based upon what ~~are~~, in fact, no grounds at all, and is, therefore, made without jurisdiction. Accordingly we set it aside, and direct the Deputy Magistrate to stay further action under it.

WHITE, J. WHITE, J. :—

1 concur

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF PYARI LALL AND ANOTHER APPELLANTS.

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June 20th.*Evidence Act, l. of 1872, section 33—"Incapable of giving evidence"—Discretion of Court.*

The words "incapable of giving evidence" in section 33 of the Evidence Act, l. of 1872, denote an incapacity of a permanent, not of a temporary kind; and where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But where the absence of a witness is casual or due to a temporary cause, the Court has such a discretion "if his presence cannot be obtained without an amount of delay or expense, which, under the circumstances, the Court considers unreasonable."

APPEAL from a conviction passed by the Sessions Judge of Gya.

The appellants in this case were Pyari Lall, Inspector of Police, and Modan Singh, a constable, both of whom had been convicted by the Sessions Court of Gya, of the offence of abetting the fabrication of false evidence, and sentenced, the one to five years' rigorous imprisonment, and the other to three years' rigorous imprisonment, under section 195, joined with section 109 of the Indian Penal Code. The fabrication consisted in this, that they caused a gun, part of the proceeds of a dacoity committed on the 2nd June 1878 in the house of one Ram Pershad Lall, to be found in the possession of one Bodhoo Dossad, so as to make it appear that he, the said Bodhoo, took part in the dacoity.

In respect of the one charge of which the prisoners, appellants, were found guilty, the assessors were divided in opinion, one assessor pronouncing for a conviction, and the other for an acquittal. At the trial before the Sessions Judge, the deposition of a Mr. Clark, the Assistant Superintendent of Police, taken before the committing Magistrate, was admitted in evidence, Mr. Clark being himself unable to attend the Court until after the witnesses for the prosecution had been examined. It appears

1879 that, on the 21st March 1879, the Civil Surgeon, Doctor Muller,
In re was examined and said, "He (Mr. Clark) is at present suffering
 PYARI LALL. from small-pox. He is not in a condition to attend Court and
Judgment. to give evidence. Perhaps Mr. Clark will be able to give evidence
 without injury to himself, or anybody else, in a week or so." The
 case for the prosecution closed on the 25th idem; but, on the
 2nd April, Dr. Muller, being called as a witness for the defence,
 deposed as follows: "I think that Mr. Clark, Assistant Superin-
 tendent of Police, is now capable of giving evidence in Court
 without injury to his health."

In dealing with the charge upon which the prisoners were
 found guilty, the Judge says: "In fact this part of the case
 must stand or fall on the simple question whether the evidence
 of Mr. Clark, Assistant Superintendent of Police, can be accepted
 as true;" and then, after discussing the question of the admissi-
 bility of Mr. Clark's evidence, and declaring it to be admissible,
 he further adds: "But when that evidence (Mr. Clark's) is
 considered in connection with the evidence of Kishen Dutt and
 Bodhoo Doosad, and of Wazir Ali and Tulsi Singh, I do not
 think that it can properly be rejected."

In appeal the first point raised was, that as Mr. Clark could
 have given evidence before the Court of Session, that Court was
 bound to examine him, and, in lieu of his oral testimony, could
 not accept the evidence which he gave before the Committing
 Magistrate.

Jackson, M. Ghose, and Mr. C. Gregory, for the Appellants.
Piffard, for the Crown.

The judgments of the Court (1) as to the admissibility of the
 evidence of Mr. Clark were as follow:—

MORRIS, J. MORRIS, J.—

It is contended that Mr. Clark was not incapable of giving evi-
 dence within the meaning of section 33 of the Evidence Act, and
 that, considering the temporary character of Mr. Clark's illness,
 and the extreme importance attaching, in the Judge's estimation,

(1) MORRIS and WHITE, JJ.

to Mr. Clark's testimony, the Judge ought to have adjourned the trial for a few days, in order that Mr. Clark might be examined orally. I think that this contention is right, and that the Judge has put a wrong construction upon the terms "incapable of giving evidence." I understand the words to denote incapacity of a permanent character, and not of a momentary or temporary character. The word "incapable" naturally carries this meaning with it. The allocation in the section of the words with the other conditions of an absolute and permanent character, *viz.*, that the witness is dead or cannot be found, or is kept out of the way by the adverse party, confirms this view, and a still further confirmation is found in the fact that the last clause of the section seems expressly intended to meet the case of temporary incapacity, it being left to the discretion of the Court to determine whether the delay and expense consequent upon an adjournment for the purpose of procuring the presence of a witness are likely to be so great that it would be unreasonable to incur them. As, then, Mr. Clark was incapable of giving evidence within the meaning of the section, and no unreasonable delay or expense would have been incurred in procuring his presence, I am of opinion that the deposition which he gave before the committing Magistrate was improperly admitted, and must be excluded from consideration. As to the further objection that under section 283 of the Criminal Procedure Code, no sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of the improper admission of any evidence, it is clearly met by the proviso contained in the latter part of the section, because the prisoners would certainly have been materially prejudiced in their defence by being unable to cross-examine Mr. Clark in person. A suggestion has also been made that this Court, exercising the discretion allowed to it under section 282 of the Criminal Procedure Code, might even now, at this stage of the case, admit Mr. Clark's recorded deposition, as Mr. Clark himself is not in the country and cannot be produced for the purposes of examination. We cannot, however, adopt this suggestion. One grave objection to it arises upon the medical testimony, which shows the absolute necessity of Mr. Clark's personal examination in Court. Mr. Clark's memory is described

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as seriously impaired from the effects of an accident which occurred 15 months previous. It is obvious that, unless the Court had an opportunity of judging of the then state of his memory, any statement of his made on the 15th November, relative to the identity of an article seen by him on the 15th of June previous, would be of little or no probative value. Excluding, then, the deposition of Mr. Clark, it remains to consider whether there is other sufficient evidence on the record to support the conviction. [The learned Judge here examined the other evidence on the record, and then concluded as follows: "It seems to me clear that, but for the corroboration afforded by Mr. Clark's testimony, he would never have convicted the prisoners upon the evidence of these four men. I have already explained the reasons why Mr. Clark's evidence before the committing Magistrate must be discarded. Dealing, therefore, with the remaining evidence on the record, I can come to no other conclusion than that it is entirely unworthy of belief, and that the conviction must be set aside. We accordingly set aside the conviction, and direct that the prisoners be discharged."]

WHITE, J. WHITE, J. :—

The first question is, whether the deposition of Mr. Clark, made before the committing Magistrate, was properly admitted in evidence. The Judge has admitted it under the provisions of section 33 of the Indian Evidence Act, upon the double ground that the witness was incapable of attending to give evidence, and also that his presence could not be obtained without an amount of delay or expense, which, under the circumstances of the case, the Judge considered unreasonable. I am of opinion that on neither ground is the deposition admissible. The Civil Surgeon, who was examined on the 21st of March, deposed that Mr. Clark was then suffering from small-pox, and was not in a position to attend Court and give evidence, but might perhaps be able to attend in a week or so. The illness, therefore, from which the witness was suffering was of a casual and temporary character, and this further appears to have been the case from the evidence of the same Civil Surgeon, who, in the course of this protracted trial, was again called on the 2nd

April, twelve days after his first examination, to speak to the state of health of one of the accused. On that occasion the Surgeon was again questioned about Mr. Clark's state of health, and deposed that he thought Clark could give evidence in Court without injury to his health, though it might be dangerous to keep him long in Court or subject him to a protracted cross-examination.

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WHITE, J.

The words "incapable of giving evidence" in section 33 of the Evidence Act are the same as the Legislature has previously used in the 32nd section of the Act, and mean, in my opinion, incapable from some cause, which the evidence shows to be, of a permanent character. That this is the true interpretation appears to me to be shown by two considerations: First, that the Legislature has provided for the case where the absence of the witness is casual or due to a temporary cause in the last words of the clause, which are these: "If his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court consider unreasonable." If it were intended that the words "incapable of giving evidence" should embrace cases where casual or temporary illness prevented the production of the witness, there would have been no occasion for the words at the end of the first clause of the section to which I have referred.

Secondly, the Court has no discretion under section 33 as to admitting a deposition when the witness is proved to be "incapable of giving evidence." Such a witness is in the same category as one who is dead or cannot be found, or is kept out of the way by the adverse party, and his deposition is declared by section 33 to be relevant, and must therefore be admitted. The Legislature could hardly have intended that the Court should exercise no discretion in admitting the deposition of witnesses who could not be produced at the time of the trial owing to a temporary cause, and yet such would be the result of construing the words "incapable of giving evidence" as including casual illness.

We have been referred to certain English authorities upon the meaning of the words "so ill as not to be able to travel," which are to be found in 11 and 12 Vic. 42, section 17. But these words are so different from those which we are now considering,

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WHITE, J.

that the authorities cited are of little or no assistance upon the question before us. On the other hand, I may refer, in support of the view that I have taken, to *Taylor on Evidence*, 6th edition, page 60. In enumerating the cases in which the common law regards a witness as incapable of being called, and his deposition as admissible in consequence, that text-writer mentions the case where the witness is permanently sick, but not the case where he is casually or temporarily sick.

As regards the second ground, in which the Judge has admitted Mr. Clark's deposition, we have to determine whether the Judge exercised a proper discretion. This is to be governed by three considerations—the delay, the expense, and the circumstances of the case.

The evidence shows that the delay that would have been occasioned by waiting till Mr. Clark could be produced as a witness was probably about a fortnight. As regards the expense, if by that word is meant expense in obtaining Clark's attendance, which is the natural meaning of the word when taken in connection with the context, there would have been no expense worth mentioning, for Clark lived or was staying within a short distance of the Court. It is contended, however, that the expense contemplated by section 33 is not confined to that meaning, but also includes the expense which would be incurred if the alternative course of adjourning the trial had been adopted. There are some dicta of PHEAR, J., in the case of *Reg. vs. Lukhu Santhal*, 21 W. R., Cr. Rul., p. 56, which apparently tend to support the contention. I pronounce no opinion, whether the expense contended for may, or may not, be properly taken into account by the Judge in exercising his discretion; but assuming that it may be, I think that in the present case there is no evidence that the adjournment of the trial for a fortnight would have been attended with an unreasonable amount of expense, or even any considerable expense. I come now to the circumstances of the case. Of these, one of the chief, which the Judge has and ought to weigh, is the nature and the importance of the statements contained in the deposition. It would be unreasonable to incur much delay and expense where the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for

the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial.

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PYARI LALL.

On the other hand, it might be very reasonable to submit to much delay and considerable expense, when the evidence of the deponent is vital to the success of the prosecution, or has a very important bearing upon the guilt of the accused. That Clark's evidence falls under the latter description is obvious from the remark of the Judge. He says: "The case of Bodhoo Doosad (which is the one in which the conviction has been had) must stand or fall on the simple question whether the evidence of Mr. Clark can be accepted as true."

Judgment.
WHITE, J.

No doubt the Judge afterwards modifies this, and attaches weight to the testimony of four other witnesses who were produced for the prosecution, for he says, after enumerating fifteen objections which had been urged against the trustworthiness of Clark's evidence: "If Clark's evidence had stood by itself, these objections would have had considerable weight. But when the evidence is taken in connection with the evidence of Kisheo Dutt and Bodhoo Doosad, and Wazir Ali and Tulsi Singh, I do not think it can properly be rejected." Still, the Judge clearly attached very great importance to Clark's evidence, and ~~why this~~ ^{why this} was so, is clear, for the main question in the case is, whether a particular double-barrelled gun, which is alleged by the accused to have been found in the possession of Bodhoo Doosad at the time of his arrest, was in the possession of the accused some few days previous to the arrest. The prosecution have, therefore, to establish that the accused had possession of a double-barrelled gun at the latter time, and that it was the same gun as the accused stated to be afterwards found with Bodhoo Doosad when arrested. Clark's statements are directed to the proof of these facts. Their satisfactory proof is vital to the prosecution; in fact, they constitute the pith of the case.

I am of opinion that the Judge ought not to have held that the delay and expense of obtaining Clark's presence as a witness was unreasonable under the circumstances of the present case. He should have postponed the trial for the attendance of Mr. Clark, and ought not to have admitted his deposition. In *Reg. vs. Mowjan*,

1879

20 W. R., Cr. Rul., 69, MACPHERSON, J., in 1873, made the following remarks, in which I entirely concur: "Section 33 of the Evidence Act gives the Court new powers, which require to be exercised with great caution. There is no doubt that it is still necessary (just as much as ever it was) to produce every witness at the trial, unless it is proved to be either actually impossible to produce him, or to be so difficult to do so that it is, under the circumstances, unreasonable to insist on his production."

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PYARI LALL,
Judgment.
WHITE, J.

I agree, therefore, with my brother MORRIS in rejecting Mr. Clark's deposition. As regards the rest of the evidence for the prosecution, I also agree that it is not such as we can safely act upon, and that the conviction, therefore, cannot be upheld.

[CRIMINAL REVISIONAL JURISDICTION.]

SHEIKH ERAD ALI

PETITIONER;

AND

NUSIBUNNISSA BIBEE OPPOSITE PARTY.

June 13th.

No. 125 of
1879.*Criminal Procedure Code, section 147—Dismissal of complaint.*

A charge of theft was preferred by the petitioner, on the 7th October 1878, before the police, who thereupon instituted inquiries, which subsequently resulted in their finding the charge unproved. . Meanwhile, on the 15th October, the charge was repeated in a complaint before the Magistrate of the district, who directed the complainant and his witnesses to attend on a particular day, but subsequently, without having examined them or the complainant, referred the matter to the Sub-Deputy Magistrate. That officer having reported the charge to be false, the Magistrate, on the 9th November, wrote upon the police report, which had meanwhile, on the 26th October, been submitted to him, the following direction, *vis.*, "Show as false."

On the 19th November a counter-prosecution, under sections 211, 182, and 500 of the Penal Code, was sanctioned, and eventually, on the 22nd May 1879, resulted in the petitioner being convicted. While the counter-prosecution was pending, the petitioner, on the 22nd April, applied to the Magistrate to proceed with his complaint according to law, but was informed that his complaint was dismissed. On the following day the Magistrate recorded the following order: "Dismissed in accordance with my decision recorded in the, police report under section 147 of the Criminal Procedure Code."

Held that the complaint had been improperly dismissed, and that the order of the Magistrate, dated 23rd April 1879, must be set aside,

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SHEIKH ERAD
ALIv.
NUSIBUN-
NISA BIBEE.Judgment.

THIS was an application to set aside an order of the Magistrate of Howrah, made on the 23rd April 1879, dismissing a complaint preferred by the petitioner against one Nusibunnissa Bibee. The circumstances which gave rise to the application will be found reported in the case of *Nusibunnissa vs. Sheikh Erad Ali*, ante, p. 413.

A rule to show cause why the order in question should not be set aside was made on the 14th May, and now came on for hearing.

Baboo Kali Churn Bannerjee, in support of the rule.

The Judgment of the Court (1) was as follows —

The petitioner laid a charge, of theft against Nusibunnissa Bibee and others, at the Golabari Police Station, on the 7th October 1878. The police made some inquiry into the case; but as they did not send it up to the Magistrate as speedily as the petitioner thought they ought to do, he laid a complaint before the Magistrate of Howrah on the following 15th October, and on the 30th of the same month the Magistrate made an order that the petitioner should bring his witnesses, or have them summoned within five days. On the 6th November the petitioner produced his witnesses, but neither he nor the witnesses were examined. The parties were discharged on their own recognizances to attend on the 8th of November. On that day the Magistrate again, without examining the complainant or his witnesses, directed the Sub-Deputy Magistrate to give his opinion upon the case after hearing the witnesses. This the Deputy Magistrate did, and he wrote a memorandum, which, after noticing certain discrepancies in the evidence of the prisoner's witnesses, concluded in these words: "I do not think that the charge of theft was true." After this opinion had been returned to the Magistrate, the police sent to him their report of the case, dated the 26th of October. This they submitted in the form C, which indicates, not that in their opinion the charge was false, but that they had not found any sufficient evidence which would

justify them in sending up for trial the parties charged. The reason for the police making their report in this form sufficiently appears on the face of the report. On the 9th of November, the Magistrate, without proceeding further with the petitioner's complaint, wrote across the report, "Show as false;" and on the 19th November following, on the application of Nusibunnissa, sanctioned the prosecution of the petitioner, for giving false information to the police, under section 182 of the Penal Code, and for laying a false charge under section 211. A prosecution was accordingly instituted before the Deputy Magistrate, who, on the 8th January, discharged the petitioner, under section 215, mainly on the ground that the sanction was invalid. The matter was referred to the High Court, and, on the 3rd April the Magistrate was directed by this Court (see *ante*, p. 413) to proceed with the trial, and the petitioner, as we are informed, was convicted on the 22nd May. Whilst the prosecution was pending, and on the 22nd April, the petitioner applied to the Magistrate to proceed with his complaint, and deal with it according to law. The petitioner was told by the Magistrate to come the next day, which he did, and was then informed that his complaint had been dismissed. The order of dismissal is dated the 23rd of April, and is in these words: "Dismissed in accordance with my decision, recorded in the police report, under section 147 of the Criminal Procedure Code." The decision alluded to by the Magistrate, as recorded in the police report, consists of the words which he wrote across the police reports, "Show as false."

It is objected here that this complaint has not been properly dismissed under section 147, inasmuch as it was dismissed without examining the petitioner, and we think that that objection is well-founded. Section 147 is explicit that the Magistrate must examine the complainant before dismissing his complaint, and the reason is plain, and founded on a maxim of common justice, namely, a Magistrate should not form a judgment adverse to the complainant or his case without first hearing what he has to say. It is not easy to understand how the Magistrate could have been under the impression that what he wrote across the police report was a dismissal of the petitioner's complaint under section 147.

[CRIMINAL.]

C. L. R. 50.

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 SHEIKH ERAD
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 NISSA BIBBE.
 Judgment.

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SHEIKH ERAD
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NISSA BIBEE.Judgment.

At the utmost, it amounted only to a direction or order to the police. Furthermore, the High Court, on the 3rd of April, in its judgment on the application that was made to cancel the order made by the Deputy Magistrate under section 215, expressly mentions that "Show as false" could not be treated as a dismissal under section 147. Here the Magistrate was in possession of the complaint, and he could only legitimately dispose of it, either by himself pursuing the procedure pointed out by that section, or by transferring the complaint to some Subordinate Magistrate to dispose of it according to law, neither of which courses he has adopted. The reference to the Deputy Magistrate for his opinion, and the opinion of the officer that the charge was not true, did not discharge the Magistrate from examining the petitioner. Under these circumstances, we must make this rule absolute, and set aside the order of the Magistrate of the 23rd of April 1879.

The petitioner in his petition also asked that the order sanctioning his prosecution should be set aside; but he did not insist upon that part of his prayer before us, and very properly so. Having regard to the judgment and order of the High Court of the 3rd of April, directing the Magistrate to try the accused, the proper time for the petitioner to raise that objection is, if and when he takes proceedings to test the validity of his conviction.

I cannot conclude this judgment without observing upon the extreme inconvenience and prejudice which the petitioner has suffered by the mode in which his complaint before the Magistrate was dealt with. Judging from the petitioner's case, as it appears upon the police report of the 26th of November, it was one in which the examination of the petitioner was peculiarly necessary before coming to the conclusion that there was no sufficient ground for proceeding with his complaint to use the language of section 147, and, *à fortiori*, before coming to the conclusion that it was false. Four times, if not oftener, the petitioner attended before the Magistrate to support his complaint, and once he came with his witnesses in pursuance of the order of the Magistrate, and ultimately, without ever having been examined by the Magistrate, and without any legal dismissal of his complaint, was put upon trial for making the complaint.

[CRIMINAL REVISIONAL JURISDICTION.]

THE EMPRESS *July 28th.**No. 204 of
1879.*

AND

GONESH DOOBAY AND ANOTHER

Indian Penal Code, sections 304, 304A.

Where the accused, a snake-charmer, exhibited a recently captured venomous snake, a cobra, without having extracted the poison, and in doing so placed it upon the head of a boy, who took fright and was bitten in the hand, and died shortly after from the effects of the bite, *held* that the accused was punishable, not under section 304A, for causing death by a rash or negligent act, but under section 304 of the Penal Code, as having done an act which had resulted in death, with the knowledge that it was likely to cause death, but without any intention to cause death.

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 THE EMPRESS
 v.
 GONESH
 DOOBEE.
 —
Judgment.
 —

CRIMINAL REFERENCE, under 'section 263 of the Code of Criminal Procedure, by the Officiating Additional Sessions Judge of the 24-Pergunnahs.

The reference was made under the following circumstances:—

A snake-charmer, named Gopi, caught a venomous snake, a cobra, and refusing to extract the poison, some days later, on the 26th May last, began to exhibit it. He was joined by one Gonesh Doobey, and a crowd of spectators collected, among whom was a boy, named Brojo, whom Gonesh selected as a suitable person to help them in showing off their dexterity with the spake.

It would appear that Brojo's parents objected to his being placed in such a position of danger, but allowed Gonesh to overrule their objections.

Gonesh put the snake upon the boy's head, but removed it, when the father objected, only however to replace it a moment later. The boy took fright, and, in trying to push away the snake, was bitten on the hand, and died shortly after.

Gonesh and Gopi were both tried before the Sessions Court.

The jury were of opinion that these exhibitions were warranted by custom; that there was no intention to kill the boy; that virtually his parents consented to the boy being used for the purpose of exhibition by the accused persons; and that the death was purely the result of an accident.

The Sessions Judge was unable to concur with the jury, being of opinion that, as the accused persons, both being by training snake-charmers, were well aware of the deadly nature of the snake, it was the grossest act of rashness and negligence on their part to cause the boy to risk and lose his life, and that the case, therefore, clearly fell within section 304A of the Indian Penal Code.

The judgment of the Court (1) upon the reference was as follows:—

The Officiating Additional Judge of the 24-Pergunnahs, differing from the jury, has referred this case to the High Court under section 263 of the Code of Criminal Procedure.

The facts of the case are fully stated in the order of reference. We think that the offence committed by the prisoner Gonesh was

an offence under section 304 of the Indian Penal Code. He did not intentionally cause the boy's death, nor did he, knowing that the act was "so imminently dangerous that it must, in all probability, cause death," put the snake upon the boy.

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The case put by the prosecution, and referred to by the Judge in the charge, was one in which the prisoner actually caused the snake to bite the person who was killed. It differs, as the Judge remarks, materially from the present case, because then there was clearly the knowledge of imminent danger that must in all probability cause death.

The Judge, in referring the case, was of opinion that the prisoners should be punished under section 304A; but this section does not apply to the present case, in that, for the reasons stated above, we consider that the "rash act" did amount to culpable homicide.

We think it may be said in this case that Gonesh did not think that the snake would bite the boy. But we think that the act was done with the knowledge that it was likely to cause death, but without the intention of causing death. We think Gonesh should be sentenced to three years' rigorous imprisonment.

Gopi, we think, abetted Gonesh, and is punishable under sections 14 and 304, Indian Penal Code; but as he took a less active part in the matter, he should be rigorously imprisoned for one year only.

We sentence the prisoners accordingly.

(1) MC DONELL and BROUGHTON, JJ.

[CRIMINAL REFERENCE.]

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Presidency Magistrates Act (IV. of 1877), sections 234, 235, Powers of Magistrates under—Maintenance, Stay of order for—Divorce under Mahomedan Law, Effect of.

A Presidency Magistrate is competent to stay the operation of an order, made under section 234 of Act IV. of 1877, for maintenance of a wife, and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order, which must be taken to have been a proper and legal order when it was made; and he is competent to try all questions which affect the rights of a woman to receive maintenance.

For the purposes of Chapter XVIII. of Act IV. of 1877, a Magistrate must, when a question of divorce arises, determine, on such evidence as may be before him, whether there has or has not been a legally valid divorce.

REFERENCE under section 240 of the Presidency Magistrates Act (IV. of 1877).

In this case three Mahomedans sought to set aside an order made by Mr. Amir Ali, Officiating Chief Presidency Magistrate, giving their wives maintenance, on the ground that, since the order was made, they had each divorced their wives.

The Chief Magistrate, to whom the applications were originally made, had the matter argued before himself and Mr. Souttar, the Presidency Magistrate of the Southern Division.

The result was that both agreed in dismissing the application, subject to the opinion of the High Court upon the points stated in the following reference:—

“Several applications have been made to us recently for setting aside certain orders made by us, under section 234 of Act IV. of 1877 (Presidency Magistrates Act), on the ground that, since the

date of these orders, the petitioners have divorced their wives, in whose favour such orders were made. The practice in these Courts has hitherto been to dismiss such applications summarily; but in view of the importance of the question involved, we allowed the parties to argue the points before us. The applications are made under section 235 of the Act, which provides that, on proof of an alteration in the circumstances of the parties, the Magistrate may alter the amount ordered. Looking to the wording of this section, and taking it in connection with section 30 of Act IV. (B. C.) of 1866, for which it is substituted, we have held that we had no power under that section to cancel our orders on the ground of divorce. It has been also contended before us that as the Mahomedan law allowed a husband to divorce his wife at any time and for any reason, the Magistrate's order cannot be enforced after the repudiation. In support of this contention, two cases were cited—*Nepoor Aurut vs. Furai*, 19 W. R., pp. 73 and 74, and *In re Kasam Purbhai*, 8 Bom. H. C. R., C. C., 95—one of which, however, did not seem to us to decide the point definitely, and the ruling in 8 Bom. H. C. R. appeared to us to contemplate a case where the divorce was admitted, or where it had received the sanction of a Court of competent jurisdiction as to its validity. Considering the infinite forms of divorce recognized by the Mahomedan law, each differing from the other in its legal consequences, and the difficulties which would arise if the Criminal Courts were to enter into such questions, we have held that we had no power to try the validity of a divorce, where the fact was disputed by the wife.

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“As the question, however, is one of considerable importance, and as we think it a fit case to refer to the High Court, we solicit the opinion of the Honourable Court on the following points:—

“(1) Whether the Presidency Magistrates have the power of cancelling, under section 235, orders made under section 234 on the ground of divorce?

“(2) When the fact of the divorce or its legality is disputed by the wife, whether the Criminal Courts have the power of trying the question?”

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The judgment of the Court (1) upon the reference was as follows :—

The questions referred to this Court are as follow :—

In our opinion a Magistrate is competent to stay the operation of an order for maintenance of a wife made under section 234, Act IV. of 1877, and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order, which must be taken to have been a legal and proper order when it was made, and he is competent to try all questions raised before him which affect the right of a woman to receive maintenance. This is the view taken by the Bombay High Court in the case cited in the reference (*In re Kasam Pirbhai and his wife, Hirbai*, 8 Bom. H. C. R., C. C., 95). The Court, in the exercise of its criminal jurisdiction, inquired into the fact and legality of the divorce there alleged, and having found that there had been a legal divorce, it declared that the Magistrate ought not to issue an attachment upon, or otherwise to execute the order, he being, in fact, *functus officio*.

The power of the Magistrate to act in this way does not, in our opinion, arise from the change in the provisions of section 13, Act IV. (B. C.) of 1866, introduced by section 235, Act IV. of 1877, and does not depend upon the expression "may make such alteration in the allowance ordered as he thinks fit." These words, read with the proviso which immediately follows them, "provided the monthly rate of Rs. 50 be not exceeded," and with the provisions of the earlier law, which only admitted of reduction of the amount ordered, and gave no authority to a Magistrate to increase such amount on proof of a favourable change of the circumstances of the person ordered to pay, seem to us to be intended only to vest in a Magistrate a power to revise any order of maintenance previously made, on proof of change of circumstances, with a view to alter the amount to that which may be appropriate under the new circumstances.

It is not, we think, doubted by the learned Magistrates who have made this reference, that an order of dissolution of marriage under the Indian Divorce Act would put an end to the operation

of a Magistrate's order for maintenance, but they seem to draw a distinction between the case of persons subject to the Divorce Act and Mahomedans who can exercise the power of divorce at their own pleasure, and without the intervention of any Court. This distinction cannot, in our opinion, be maintained. Whether the dissolution of the bond of marriage is capable of being effected in one way or in another, when once validly effected, it must operate to stop the operation of a Magistrate's order made in favour of a *wife*. With the cessation of the conjugal relation, the responsibilities attaching thereto cease. It is only on proof of the existence of this relation (we have not now to deal with the case of children) that a Magistrate can make any order at all, and any order made is to be for a monthly allowance for the maintenance of a *wife*, and it is as *wife* that the woman is to continue to receive an allowance. The last clause of section 234, which is so worded as to apply either before or after an order for maintenance is made, shows that conduct inconsistent with her duties as *wife* will take away her right to receive it, even while the conjugal relation remains undissolved.

If a woman makes an application to a Magistrate for an order for maintenance against her husband, she must, if the relation of husband and wife is disputed, prove its existence. It may, perhaps, be admitted that there had been a marriage, but alleged that it has been dissolved. A Magistrate must of necessity inquire into the fact of marriage in the one case, and into the fact of dissolution of marriage in the other, and we find that in one of the cases referred, the learned Magistrate did try the plea of divorce. Unless the woman making the application is a wife, he has no power to make an order of maintenance. In the case of alleged divorce, the divorce must be proved, whether the parties are Christians or Mahomedans. The means of proof are different, but the mode of procedure, as far as the Magistrate is concerned, is the same. He is to determine on evidence whether the allegation of divorce is true. In the one case, the only possible mode of divorce is by a decree of a competent Court, and the decree is conclusive as evidence. In the other, a recourse to a Court is wholly unnecessary, and unless it should happen that the question has been already decided between the parties in a

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competent Court, the Magistrate must draw his own conclusions from the oral and other evidence put before him as best he may.

The fact that the power of divorce given by the Mahomedan law may be so exercised as to defeat the intention of the Legislature as expressed in section 234, Act IV., 1877, and other similar enactments, may go to show that further legislation is required, but it cannot affect the law as it stands. It has been said by the learned pleader (who appeared before us on behalf of the petitioner to the Magistrates) that the right to exact payment of dower immediately on dissolution of marriage is a sufficient check to the abuse of that power: this, however, is not matter for present consideration.

In our opinion, it is, under the terms of section 234, as essential to the continued operation as to the original making of an order of maintenance, that the recipient of the allowance should be a *wife* at the time for which maintenance is claimed; and consequently, for the purposes of Chapter XVIII. of the Presidency Magistrates Act of 1877, a Magistrate must, when a question of divorce arises, determine, on such evidence as may be before him, whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF CHUTRAPUT SINGH . . . PETITIONER.

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September 9th*Criminal Procedure Code (Act X. of 1872), section 530—Possession, symbolical under decree of Civil Court, Effect of—Jurisdiction.*No. 186 of
1879.

A certain mouzah having been sold in execution of a decree obtained upon a mortgage, the purchaser claimed a right under the sale to a haut appurtenant to the mouzah, and was put by the Nazir of the Civil Court into symbolical possession of the haut as well as of the mouzah. The judgment-debtor refused to give up actual possession of the haut, maintaining that it was debutter property of which he was the shebait. A breach of the peace being imminent in consequence of the rival claims, proceedings were taken under section 530 of the Criminal Procedure Code, and the Magistrate, finding that the judgment-debtor was in actual possession of the haut, made an order maintaining him in such possession until ousted by a Civil Court.

Held (setting aside that order) that the Magistrate had no power under section 530 of the Criminal Procedure Code, to direct the judgment-debtor to be retained in possession until ousted by a Civil Court, but was bound to see that the possession, as given by the Nazir, was maintained, leaving it to the debtor to substantiate his claim as shebait in a Civil Court.

The Court accordingly directed that the purchaser be restored to possession, and that the Magistrate do see that he is kept in possession until ousted by due course of law.

RULE to show cause why an order of the Magistrate of Howrah, dated 10th July 1879, should not be set aside.

The circumstances under which the order was made were these: Rajah Girendro Chunder Roy held, with another member of the same family, Rajah Purna Chunder Roy, in Bali, one of the mouzahs in Lot Mahammad Aminpur. He mortgaged the Lot to Durga Charan Lala, and on the latter foreclosing the mortgage the whole property was sold and bought by Chutraput Singh. In the village of Bali, it appears, a daily haut was held, and Chutraput Singh claimed to have acquired this with the purchase of the Bali mouzah. Rajah Girendro denied that this haut passed by the sale, claiming it as his debutter property,

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and maintaining that he and his co-sharers were in possession of it as such, before the execution-proceedings, and that they had held possession ever since.

In consequence of the endeavours of Chutraput Singh to assert his alleged right, a breach of the peace appeared to be imminent, and proceedings were, therefore, taken by the Magistrate under section 530 of the Code of Criminal Procedure. Evidence was gone into on both sides, and it was found that the proprietary rights in the *haut* were exercised by daily collections in cash and kind (*dan* and *tola*) from persons offering their goods for sale at the *haut*, and that contributions of both cash and kind had been collected daily on behalf of Rajah Girendro Chunder Roy.

The Nazir, who had been directed by the Civil Court to give possession in execution of the decree obtained by Durga Charan Lala, gave evidence to the effect that he had given possession to the purchaser, Chutraput Singh, by planting a bamboo and beating a drum. The bamboo was not planted in the *haut*, but a proclamation, he said, was made in the *haut*, declaring that the share therein of Rajah Girendro Chunder Roy had passed to Chutraput Singh.

The Magistrate, however, refrained from coming to any conclusion upon the Nazir's evidence as to whether symbolical possession had been given of the *haut*; and, on the 10th July 1879, made an order in the following terms: "I can have no doubt that, as a matter of fact, Rajah Girendro Chunder Roy has been, since the Nazir gave possession of the *zemindari*, in actual enjoyment of his former rights in the *bazar*, and I accordingly declare that Rajah Girendro Chunder Roy is entitled to retain possession of the 5-annas share in Bali Bazar until ousted by due course of law, and I forbid all disturbance of possession till such time."

Chutraput Singh then applied to the High Court to have this order set aside.

The application was heard before Mr. Justice AINSLIE and Mr. Justice BROUGHTON, and by them a rule was granted, calling upon Rajah Girendro Chunder Roy to show cause "why the Magistrate should not be directed to make further inquiry, and determine whether the Civil Court did or did not give possession to the petitioner."

This rule came on for hearing before Mr. Justice MORRIS and Mr. Justice PRINSEP.

Baboo *Sreenath Dass* and Baboo *Rashbehary Ghose*, for the Petitioner.

M. Ghose, and Baboo *Bhowani Churn Dutt, Jr.*, showed cause.

M. Ghose.—Further inquiry, as suggested by the rule, is unnecessary on this point, as even upon the assumption that the formal possession was given to the petitioner by the Civil Court Nazir, the Magistrate was competent to find upon the evidence, as he has done in this case, that at the time of the institution of this proceeding we were *de facto* in possession.

[MORRIS, J.—We think the rule ought not to have been a limited one, but as we did not grant it, we should like to consult with the Judges, who did, and then decide whether we ought to hear the case.]

The learned Judges, after consultation with AINSLIE and BROUGHTON, JJ., directed that the rule as originally granted be discharged, and of their own motion ordered that a fresh rule should issue calling upon Rajah Girendro Chunder Roy to show cause why the order of the Magistrate maintaining him in possession should not be set aside, and proper orders passed in this case.

On this new rule coming on for hearing, *M. Ghose* (*Branson* with him) again appeared to show cause.

M. Ghose.—The Magistrate has distinctly found upon evidence that we are in possession of the *haut*, which we allege to be debutter property.

[PRINSEP, J.—But the Magistrate was bound to maintain the other side in possession, as the Civil Court had ordered possession to be given to him.]

I submit the Magistrate has nothing to do with the order of the Civil Court in a matter like this, but has to find who is in actual possession.

[PRINSEP, J.—Your property has been sold, and purchased by the petitioner; if you have any claim, you ought to go to the Civil Court.]

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I submit your Lordships, sitting as a Criminal Court, have nothing to do with the rights of the parties, and that the Magistrate has very properly excluded from his consideration the rights of the parties.

[PRINSEP, J.—But the Magistrate was bound to act in conformity with the orders of the Civil Court.]

I submit that there is nothing in the law to warrant the Magistrate in so acting, unless there has been a decree *inter partes* declaring the right to possession.

[PRINSEP, J.—You are the judgment-debtor, and if the *haut* is debutter property, you ought to bring a suit to establish your right.]

This Court, I submit, has simply to see, whether the Magistrate's order is within his jurisdiction, and whether there is any evidence to support it.

[PRINSEP, J.—We must see that substantial justice is done.]

I submit that it is the province of the Civil Court only to see whether our possession is rightful.

[MORRIS, J.—Do you contend that the Magistrate is not bound by an order of the Civil Court?]

I contend that, as a matter of law, the Magistrate is not bound by any order of the Civil Court, and must decide the question of actual possession irrespective of any such order.

[PRINSEP, J.—Are you aware of a case in 16 W. R., in which the contrary has been held?]

I was about to cite and distinguish it from the present case. That was the case of *Rai Mohun Roy vs. Wise*, 16 W. R., Cr., 24, in which a decree for possession had been made by the Civil Court as between the parties to the proceedings in the Criminal Court, and the Court held that the Magistrate ought to be guided by the terms of that decree.

It is not necessary for me to question the soundness, as a matter of law of that decision, for there is a manifest difference between that case and the present. Here we say that the *haut* being debutter property could not have been sold, and consequently could not have been legally made over to the auction-purchaser; we further say that, as a matter of fact, as found by the Magistrate, we never gave up possession of the *haut*.

[PRINSEP, J.—But the Nazir says that when he planted the bamboo he included the haut also.]

We say that the haut was not included; but even if it was included, the question whether it was rightly included has yet to be decided by the Civil Court. If a Magistrate were bound as a matter of law to hold that, irrespective of the fact of actual possession, the party in whose favour the Nazir chose to plant a bamboo must be maintained in possession under section 530, his decision would virtually depend upon the word of the Nazir or his peon.

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In the case of *Nobin Chunder Koondoo vs. Jogendra Nath Bhattacharjee*, 25 W. R., Cr., 18, it was distinctly held by GLOVER and MITTER, JJ., that the act of a Civil Court peon delivering over possession of the disputed land to the purchaser does not take away the power of a Magistrate to inquire into the question of possession under section 530.

[PRINSEP, J.—There is a case the other way in 25 W. R., Cr., 46—*Sonai Sardar vs. Bukhtar Sardar*.]

That is a very different case; there, there was a conviction for mischief, and the Court refused to interfere.

[MORRIS, J.—But the case you have cited is really against you, for the first party in that case was wholly unconnected with the proceedings in the Civil Court. Here, you were a party in the civil suit.]

I submit that does not really distinguish the case, for we claim as shebait, and the whole question in the civil suit will be whether our claim is well founded.

Suppose the first party in the case in 25 W. R., Cr., 18, were only a benamidar for the judgment-debtor, would the proof of that fact have taken away the Magistrate's jurisdiction? I submit that there is a clear distinction between a case in which the Civil Court has made a decree for possession *inter partes*, and a case where the right to possession is yet open to litigation.

In a very recent case tried by GARTH, C. J., and KEMP and BIRCH, JJ.—*Sheikh Munglo vs. Durga Narain Nag*, 25 W. R., Cr., 74—it was held that symbolical possession, though entitled to consideration, was not entitled to weight as against a party proved to be in actual possession (see page 80). KEMP, J., indeed,

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expressed his opinion that symbolical possession would be no evidence such as a Magistrate could proceed upon, in inquiring and deciding upon which party was in actual possession of the subject of dispute.

[MORRIS, J.—We can set aside the finding of the Magistrate if we find it is against the evidence.]

I submit not. Under section 297, 'Code of Civil Procedure, your Lordships cannot interfere in this case, unless you are prepared to hold that, as a matter of law and irrespective of the evidence, the Magistrate was bound to maintain the other side in possession.

The other side was not called upon.

The judgment of the High Court (1) was as follows:—

The subject of dispute in this case is a certain Haut Chandni, appurtenant to the village of Bali. On the 23rd June last, upon the petition of one Prosunno Coomar Chuckerbutty on the part of Girendro Chunder Roy, who complained of the threatening conduct of the servants of Chutraput Singh, the opposite party, in connection with the haut, the Magistrate instituted proceedings under section 530 of the Criminal Procedure Code. Chutraput Singh alleged that in execution of a decree of the Civil Court, the zemindari properties of Girendro Chunder Roy were put to sale and purchased by him on the 9th December 1878; that amongst these were the village of Bali, together with its Haut Chandni; and that in the month of Choit last, that is, in the course of March and April 1879, the Nazir of the Court put him in possession of these properties, including Bali with its haut.

On the other hand, Girendro Chunder Roy, whilst admitting that the zemindari properties had passed into the hands of Chutraput Singh, and not denying the allegation of Chutraput Singh that Bali, together with Haut Chandni, formed part of the properties sold, contended that Haut Chandni was a *debutter* property which he held in trust as shebait, and that Chutraput Singh had been put in possession of the village of Bali only and not of the Haut Chandni. The Magistrate visited the scene of dispute, and after examining the witnesses and taking evidence adduced by

either side came to the conclusion that the preponderance of proof of possession was in favour of Girendro Chunder Roy, and gave an award declaring Girendro Chunder Roy entitled to retain possession of the *haut* until ousted by due course of law. In his judgment, the Magistrate gives at length his reasons for this conclusion. He sets aside at the outset all considerations arising out of the action of the Civil Court in giving possession of the *haut* to Chutraput Singh, and treats the case as though it were an ordinary dispute for possession of land between two rival zemindars. He says: "I warned either side at the outset that I should pay no attention to any evidence as to the right to possession, and the warning has been fairly attended to. The question as to whether the bazar is *debutter* or *mal*, and whether it is the 'Haut Chandni' mentioned in the deed of mortgage in foreclosure of which the village was sold, has been touched lightly by either side. A finding in favour of the 2nd party on the question would not help him in these proceedings unless I could follow it with another finding that the Nazir gave him symbolical possession of the bazar with the rest of the village when he planted a bamboo there some time in Choit, and a finding again in his favour on this point would be in no way conclusive unless, since the date of *bans-garce* and up to the date of institution of these proceedings, he has been in actual possession of a share in the bazar, and in actual receipt of the rents and perquisites therefrom. As a matter of fact, no real evidence has been offered as to the nature of the property, and the evidence that has been offered as to the Nazir's proceedings, I may pass over to get at the real point in issue—the proceedings of the two rival representatives in the bazar since the Nazir's visit."

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It is in consequence of this disregard by the Magistrate of the action of the Civil Court, as proved by the evidence of the Nazir, that the petitioner Chutraput Singh seeks the interference of this Court under section 297.

It seems to us that there is much force in his contention, and that the Magistrate is not competent, under section 530, to nullify the action of the Civil Court. He was bound to satisfy himself whether, in delivering possession, the Civil Court did or did not give possession of the land on which the market is held.

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If it did give such possession, and the possession was not subsequently abandoned, the action of the judgment-debtor in refusing obedience to its order is not enjoyment of the possession such as the Magistrate is to uphold. The question may hereafter arise, whether possession was wrongly given of this particular land; but if it was given, and the party to whom it was given has not subsequently withdrawn from it, and let another come in and establish himself thereon in such a manner that he can set up a peaceful enjoyment, the Magistrate is bound to maintain the order of the Court.

Now, that the Nazir did, in obedience to the order of the Court, put Chutraput Singh in possession of the haut in dispute, as well as of the village of Bali, is proved by his own evidence. He says: "I gave possession by planting a bamboo, and beating a drum. There are 267 villages in Muhammad Amurpore. I went through the usual form in every village. I began in Choit, and it took me thirty-one days. I gave possession of Joyram Sircar who was empowered to give receipt. The receipt was in the terms of this authenticated copy produced. The receipt contained the words, 'Bali mai haut.' I got out of my boat at the ghat, and went from there to the thannah over the bazar, declaring that possession of Girendro Chunder Roy's share had been given to Chattro Singh. I planted a bamboo about two bighas from the thanna near a dispensary. *I mentioned the haut in my proclamation*, and had a drum beaten. Joyram Sircar and Saradhar Ganguli and some others were there present."

Speaking also of the list of villages which he took with him, and according to which he gave Chutraput Singh possession, he says: "I remember that in that list 'Bali mai haut Chandni' was written." As has already been mentioned, Girendro Chunder Roy did not in his written statement deny the allegation of Chutraput Singh that "Bali mai haut Chandni" was entered in the list of properties which the Civil Court sold to Chutraput Singh. As judgment-debtor, Girendro Chunder Roy must have been fully aware of this, and therefore it does not lie in his mouth now to say that the haut was not given with the village of Bali by the Nazir into the possession of Chutraput Singh.

From the evidence and from the Magistrate's own finding it is clear that Chutraput Singh has never withdrawn from the possession given him by the Nazir. He has, in spite of the opposition of Girendro Chunder Roy, sought to maintain his possession by the exaction of the haut dues, and that Girendro Chunder Roy, the long-established proprietor, should be in a position to give the better evidence of holding possession of the haut is not to be wondered at. But we are of opinion that when the Magistrate found that the Nazir, acting upon the authority of the Civil Court, had, rightly or wrongly, given possession of Bali "mai haut" to Chutraput Singh, it was his duty to have maintained him in possession, and not to have rendered the possession given by the Civil Court a nullity. The view expressed by Mr. Justice ELPHINSTONE JACKSON in the case of *Rai Mohun Roy vs. Wise*, in 16 W. R., Cr., 24, meets with our entire concurrence. The sole object of a Magistrate in taking action under section 530 is to prevent a breach of the peace between rival claimants to a particular property. For that purpose he satisfies himself as to the party actually in possession at the time that the proceedings were instituted, and declares such party entitled to retain possession until ousted by due course of law. In other words, he declares one party entitled to retain possession until the Civil Court declares which party has the better right, and puts such party into possession.

Here the Nazir, acting under the authority of the Civil Court, had, in due course of law, put Chutraput Singh into possession of the land in dispute; and yet, in the view taken by the Magistrate, he cannot be allowed to retain the possession which the Nazir gave him, until a fresh order has emanated from the Civil Court, and another Nazir has put him in possession. Such a course of proceeding seems to us manifestly improper, as it defeats the object for which section 530 was framed. We, therefore, make this rule absolute. We set aside the order of the Magistrate, and direct that Chutraput Singh be declared entitled to retain possession of the haut, and that the Magistrate do see that he is kept in possession of the same until he is ousted by due course of law.

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EMPRESS *vs.* HARI KISTO BISWAS.1879
October 31st.*Criminal Procedure Code, sections 122 and 346—Confession.*

A defect in a confession taken under section 122 of the Code of Criminal Procedure cannot be remedied, as in the case of an examination of a prisoner under section 346, by evidence taken at Sessions.

REFERENCE under section 263 of the Criminal Procedure Code by the Additional Sessions Judge of the 24-Pergunnahs.

In this case the accused was charged with having, on the 12th July last, murdered a boy of eight or nine years of age, whose body was found in a tank the following morning. The *post-mortem* examination showed that the death was caused by drowning, and on the same day, *i.e.*, on the 13th July, the accused made a full confession before the Cantonment Magistrate of Barrackpore, admitting that he had drowned the boy in order to possess himself of a golden armlet that he wore. No certificate was appended by the Magistrate to the effect that the confession had been voluntarily made. But the Sessions Judge found that there was no reason to suppose that it was not a genuine and voluntary confession. He was of opinion, also, that it was corroborated at the trial by evidence showing—(1) that the deceased was last seen in the company of the accused on the afternoon of the day in question: and (2) that though short of funds previous to this occurrence, the accused had plenty of money that same evening. There was also other evidence showing that he was suspected from the first, and admitted his guilt before the police were sent for.

The Jury acquitted the prisoner. They considered that they would not be justified in convicting the accused in the absence of the direct evidence of eye-witnesses to the murder; they declined to act on the prisoner's own confession, though they could assign no reason for disbelieving it; they found it proved that the deceased was in the prisoner's company on the day of the occur-

rence, and that the prisoner in some manner, not satisfactorily explained by him, became possessed of money that day.

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BISWASJudgment.

The Sessions Judge disagreed with the verdict of the Jury, being of opinion that the confession was amply corroborated by evidence. He, accordingly, submitted the case for the consideration and orders of the High Court.

The judgment of the Court (1), which was as follows, was delivered by—

WILSON, J. :—

WILSON, J.

We agree with the verdict of the Jury, and a judgment of acquittal must be entered. The reason of our judgment is this: The confession which was admitted in evidence against the prisoner is clearly a confession taken under section 122 of the Code of Criminal Procedure, and not an examination of the prisoner by the committing Magistrate. As such, therefore, any defect in that confession cannot be remedied by evidence taken at the Sessions, as can be done in the case of an examination of the prisoner under section 346. Then, on examination of this confession, it appears that it does not bear the certificate of the Magistrate required by section 122, and without such certificate it cannot be received as evidence. Without this confession it is clear there is no sufficient evidence to justify the conviction. The prisoner will, therefore, be discharged.

(1) WILSON and TOTTENHAM, JJ.

[CRIMINAL APPEAL]

October 11th.

IN THE MATTER OF BEHARI HAJDI . . . APPELLANT.

No. 587 of
1879.*Criminal Procedure Code, Act X. of 1872, sections 122 and 546—
Confessions—Evidence.*

Section 122 of the Criminal Procedure Code (Act X. of 1872) does not apply to a confession recorded by a Magistrate acting under Chap. XV. or Chap. XVII., but to a confession made by a Magistrate other than the Magistrate by whom the case has to be inquired into or tried, and to a confession made during, or before the commencement of, an investigation by the police.

CRIMINAL APPEAL from a conviction passed by the Sessions Court of Burdwan.

Moonshee *Serajal Islam* appeared for the prisoner.

The facts are fully set forth in the judgment of the High Court.(1), which was as follows :—

The prisoner having been convicted of murder in the Sessions Court of Burdwan, and having been sentenced to death, his case has come up to this Court on a reference by the Officiating Sessions Judge under section 289 of the C. C. P., as well as upon an appeal by the prisoner against the conviction.

(1) WILSON and TOTTENHAM, JJ.

The conviction may truly be said to rest entirely upon a confession made by the prisoner before the Joint Magistrate of Burdwan on the 30th of July. If that confession be admissible in evidence, and if it be believed, the conviction is undoubtedly sound. If the confession be disregarded, the conviction cannot be sustained.

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BEHARI
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Judgment.

The Judge admitted the confession without demur, and charged the Jury to convict if they believed it. A verdict of guilty having been returned, the Judge convicted the prisoner and passed sentence of death. He then proceeded to record a note for the consideration of this Court that, under a Full Bench decision of the High Court of Bombay in *Bai Ratan's* case, 10 Bom. (F. B.) H. C. 166, the conviction is not maintainable, the confession bearing neither the signature nor the mark of the accused. In his letter of reference, he calls attention to the same case, and to a case lately decided in this Court—*Empress vs. Manu Panioli*, 4 C. L. R. 137, and I. L. R., 4 Cal. 696, in which the decision of the Bombay Court was approved and followed.

The prisoner's pleader has, on the strength of these cases, contended that the confession in question was not admissible in evidence by reason of defects upon the face of the document; and that these defects could not be amended by further evidence taken in the Sessions Court under the last part of section 346, C. C. P.

We fully assent to the ruling contained in the decision above cited. That ruling is simply that a confession recorded under section 122, C. C. P. is not admissible in evidence against the person making it, unless it has been recorded with all the formalities prescribed by law; and that a confession under section 122 is not an examination taken in the course of a preliminary enquiry which, by section 346, may be supplemented by evidence in the Court of Session as to the fact that the recorded statement was made by the prisoner.

Our decision in the present case must depend upon whether we hold the confession to have been one under section 122, or an examination of the accused under section 193 during a preliminary enquiry by the committing Magistrate. If it was the

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latter, there is evidence on the record, taken in the Sessions Court, which remedies all defects of form under section 346.

On the face of the proceedings in the Sessions Court, there is nothing to suggest a doubt that it is, what it purports to be an examination by the committing Magistrate. But, in order to satisfy ourselves upon this point, and to enable the prisoner's pleader to make his case as strong as he could, we adjourned the hearing of the case, and sent for the record of the proceedings before the Magistrate, which had not accompanied the reference in the first instance.

The first ground upon which the prisoner's pleader asks us to hold that the confession was, in fact, one under section 121 is, that the Magistrate attached to it a certificate, that it was in his belief made voluntarily; such certificate being prescribed by law for a confession under section 122, and not being required in respect of other confessions.

We do not think that there is any force in this argument. The presence or absence, or form or want of form, of a certificate that the statement was voluntary, cannot show under what circumstances the confession was made, nor will it alter the fact, whatever it was. If a confession be made under circumstances contemplated in section 122, the absence of the requisite certificate will not alter it into an examination taken in a preliminary enquiry, and similarly a superfluous certificate added to such an examination will not convert it into a confession under section 122. What the circumstances were, must be ascertained independently of any certificate. The second ground put forward for holding the confession to be under section 122, C. C. P., was that it was made on the 30th of July, several days before the examination of the witnesses, which was on the 4th of August, and, for this purpose, the Magistrate's record is referred to. But, if that record is to be used, the whole must be considered, and it seems to us, on examination of the Magistrate's record, impossible to hold that the prisoner's confession was under section 122, C. C. P. That section applies, we think, to a confession made to a Magistrate other than the Magistrate by whom the case has to be inquired into or tried, but who may not even have jurisdiction to inquire into or try it; and to a confession made while the case

is still under investigation by the police, or before such investigation has commenced. It does not apply to a confession recorded by a Magistrate acting under Chapter XV. or Chapter XVII. of the C. C. P.

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Judgment

In the present case, the confession was made to the Magistrate who enquired into and committed the case to the Sessions; and the Magistrate was then acting, we think, under Chapter XV. The confession was made when the case was no longer under investigation by the police, and when the prisoner had been brought before the Magistrate under section 190 of the C. C. P. The enquiry by the Magistrate thereupon commenced, and his examination of the prisoner from that moment came under section 193. It is not the common case of a prisoner confessing to the police in the course of their investigation, and being sent in at once to the nearest Magistrate for the purpose of having the confession recorded before he may have changed his mind about making it. In this case, the murder was committed, and the police investigation was completed, nine years ago. That investigation pointed to the prisoner as the murderer; but he, having disappeared from the locality, could not then be arrested. In July of this year, it seems from the Magistrate's record, that the Joint Magistrate of Burdwan received information of the prisoner's whereabouts. On the 24th of that month, he issued a warrant for his arrest addressed to the Commissioner of Police for Calcutta. The warrant was executed in the Hooghly District on the 29th, and the prisoner, with his companion, the widow of the murdered man, was brought from Hooghly, and, on the 30th, was placed before the Joint Magistrate of Burdwan in obedience to his warrant. That officer then proceeded to examine the prisoner, who thereupon confessed; and, after examining him, he sent him to jail, admitted his companion to bail, and directed that the witnesses for the prosecution be sent in. These proceedings were evidently under Chapter XV., sections 193 and 194, and section 122 can have no application to them. On the 4th of August, the witnesses for the prosecution were examined by the same Magistrate, and the prisoner was committed to the Sessions.

There is an obvious difference between this case and that reported at page 696, I. L. R., 4 Cal. In that case, the Magistrate was

[CRIMINAL.]

C. L. R. 53.

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—
Judgment.

clearly not acting under Chapter XV., for, when he recorded the confession, he was not within the local limits of his jurisdiction; and as stated by one of the learned Judges of this Court, the prisoner was brought before the Deputy Magistrate simply for the purpose of having his alleged confession recorded. Hence, that confession clearly comes under section 122.

For the reasons stated, we think that the confession in question was fully admissible in evidence at the trial, and that any defect in respect of the prisoner's signature or mark was cured by the evidence of the Magistrate's mukurrir who was examined at the trial.

The confession being good evidence, there remains no question as to the propriety of the conviction, nor can we see any reason why the sentence passed should be other than capital. The Sessions Judge's suggestion, that the lapse of time since the murder might be considered as a ground for commuting that sentence, does not commend itself to our minds. We feel it to be our duty to affirm the conviction and the sentence of death passed upon the prisoner Behari Hajdi. His appeal is accordingly dismissed.

[CRIMINAL REFERENCE.]

HARAK NARAIN SINGH

AND

LUCHMI BUX ROY

1879
June 16th.No. 252 of
1879.

*Criminal Procedure Code (Act X. of 1872), section 530—Constructive Possession—
Possession through ticcadars.*

Section 530 of the Code of Criminal Procedure contemplates disputes between owners as well as occupiers.

Per JACKSON, J.—Where a zemindar has let his lands in farm, he, his farmers, and the occupying ryots, are all, in their degree, concerned in any dispute as to possession which may arise, and they ought to be maintained in possession of the interests which they severally enjoy.

Sutherland vs. Crowdy, 18 W. R. 11, cited. *Empress vs. Thakoor Doyal Singh*, 1. L. R., 3 Cal. 320, commented upon as having gone too far.

THIS was a reference under section 296 of the Criminal Procedure Code (Act X. of 1872), submitted by the Officiating Judicial Commissioner of Chota Nagpore under the following circumstances:—

Rival claims had been preferred by two persons, Harak Narain Singh and Luchmi Bux Roy, to certain land, and the Assistant Commissioner considered it necessary to institute proceedings under section 530 of the Criminal Procedure Code. In these proceedings he examined 4 out of 23 witnesses produced by Harak Narain, but they failed to prove that person's possession, and then, upon their evidence, which did not prove the adversary's possession, and the written statement of Luchmi Bux, he passed an order declaring the latter entitled to retain possession of the land until ousted by due course of law.

The High Court quashed this order, on the ground that it had not been based on evidence taken before the Judicial Commissioner, but upon an unverified written statement.

The Assistant Commissioner thereupon took further evidence, and upon that evidence confirmed Luchmi Bux in possession.

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It appeared, however, that Luchmi Bux had claimed to hold, not directly, but through a ticcadar.

The Judicial Commissioner, being of opinion that constructive possession was not such as was contemplated by section 530 of the Code of Criminal Procedure, referred the matter for the opinion of the High Court.

He suggested, however, that no further proceedings should be taken, as it was then nearly a year since the dispute commenced, and no breach of the peace had occurred, or now seemed likely to occur.

The following judgments were delivered by the Court (1):—

JACKSON, J. JACKSON, J. :—

The Magistrate having made a second order in this matter, after the quashing of the first, the Judicial Commissioner again submits the case to this Court, on the objection, now taken for the first time, that Luchmi Bux, the party in whose favour the order has been made, claims to hold possession, not by immediate collection of rents from the ryots, but through a ticcadar.

My brother McDONELL thinks this objection is taken too late, and may on that account be disregarded, but it seems to me that the objection, if it be valid, goes, as the Judicial Commissioner says, to the root of the Magistrate's jurisdiction, and must prevail.

I am not aware of any ground for the opinion that a zemin-dar, who has let a part of his estate in ticca, cannot be regarded as in possession, or be maintained in possession by a Magistrate, as long as section 530, Code of Criminal Procedure, or any like provision, continues in force.

The section in question re-enacts section 2, Act IV. of 1840, which was passed for the purpose of settling doubts as to the meaning of Regulation XV. of 1824, and that enactment made a change in the law as it stood under the older Regulation XLIX. of 1793.

Mr. Justice PHEAR was of opinion at one time that section 530 was applicable only to cases of actual or manual possession, such

as that of ryots, but the fallacy of this view was pointed out by Chief Justice COUCH in a later case (*Sutherland vs. Crowdy*, 18 W. R. 11), and it may be said to be settled law, that the section contemplates disputes between owners as well as occupiers of land. This, indeed, is perfectly clear when previous legislation is referred to.

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Judgment.

JACKSON, J.

The Regulation of 1793 recites the danger to the public peace arising from landholders asserting by the strong hand their claims to the possession of land, and prescribes a form of summary resort to the Dewany Adawlut or Civil Court, and Regulation XV. of 1824, dealing with a greater urgency, transfers the cognizance of such matters to the Fouzdary Adawlut, *i.e.*, the Magistrate, and the jurisdiction is continued by Act IV. of 1840, which similarly directs the Magistrate to call before him all persons concerned in the dispute (whether proprietors, dependent talookdars, farmers, ryots, or other persons), who are to "give in a written statement of their respective claims as respects the fact of actual possession," the word "actual" being here used in contradiction to the right to possession.

In section 530 the same language is used, except that the enumeration is omitted. From this we are not to infer any change of meaning, but merely to note a change in the mode of drafting, as to which it is not necessary that any opinion should be here expressed. (The change, however, dates from the Code of 1861.)

It is clear to me that when a zemindar has let his lands or a portion of them in farm, he, his farmers, and the occupying ryots are all, in their degree, concerned in any dispute as to possession which may arise, and that they may, and ought to be, respectively maintained in possession of the interests which they severally enjoy.

If this be not so, the following result might occur: The owner of an estate, A, might have a dispute with the owner of another estate, B, relating to land bordering on both. A, however, would claim possession through a farmer, and B direct possession. B, if found in possession, might obtain an order from the Magistrate; A could not.

It may be said, however, that A's farmer might be a party to

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the proceedings, and might be maintained in possession, and therefore A would not be prejudiced. But suppose that the farmer colluded with B, he might fail to prosecute his claims, and B would succeed.

For these reasons I would disallow the objection. My brother McDONELL was, it appears, a party to a decision in which a different view was taken, but whether the view then stated be that which he would now support or not, he thinks the objection taken too late to be listened to in the present case. With the foregoing expression of my own opinion, I am willing to concur in an order refusing interference.

McDo-
NELL, J.

MCDONELL, J.—

In my opinion the objection now taken to the Assistant Commissioner's decision is one which should not be entertained at this late stage of the proceedings. It should have been taken, if not before the Assistant Commissioner on the first trial, at any rate before this Court, when the case was referred to it, now nearly a year ago, and not after the case has been twice tried by the Assistant Commissioner. I would, therefore, decline to interfere with the orders now passed by the Assistant Commissioner. With regard to the objection on its merits, the case of *Empress vs. Thakoor Dyal Singh*, 1. L. R., 3 Cal. 320, I feel bound to say I now think, goes too far, in that it excludes those who are identical in interest with their sub-tenant, whereas a dispute in regard to the right to the rent may undoubtedly in certain cases, as, for instance, when the system of payment in kind prevails, involve a dispute regarding crops and other produce of land between rent-receivers which would come under section 530, as in this case the produce itself goes to the rent-receiver, and he is as much in actual possession as the cultivator; so in respect of water and fisheries, all the persons interested, landlord as well as tenant, are jointly in actual possession, and a stranger cannot interfere with them without taking away a part of the subject-matter over which their proprietary right is to be exercised. In the case of boundary lands, again, when there is a question whether a certain piece of land is occupied by the owner and under-tenant of one

estate, or by those of the conterminous estate, there is a sufficient community of interest, but when the question is, not whether A and his tenant B, or C and his tenant D, but whether B, the tenant in possession, is to pay his rents, being money rents, to A or C, I have doubts whether a Magistrate could interfere under section 530; and I feel convinced that, in the great majority of cases, a Magistrate would act far more wisely if he did not attempt to interfere, even if the law empowers him to act under this section. The intermeddling of Magistrates in such cases under colour of section 530 is not, in my opinion, conducive to the peace of the country. Disputes tending to a breach of the peace are fomented by an improper application of the powers given by this section. Each party speculating on the chance of securing the Magistrate's award in the first instance, and the advantage of the position of defendant in the Civil Court. If, instead of using this section, punishment was rigorously dealt out to those who expose themselves to it, we should hear of fewer riots arising out of disputes about rent, whether between landlord and tenant, or between two rival zemindars.

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Judgment.

McDONELL, J

[CRIMINAL REVISIONAL JURISDICTION.]

October 6th

IN THE MATTER OF JADUBAR MOOKERJEE.

Criminal Procedure Code (Act X. of 1872), section 220—Acquittal.

An order dismissing a complaint under section 220 of the Code of Criminal Procedure amounts to an acquittal

IN this case, upon a reference being made to the High Court by the Magistrate of Nuddea, under section 296C, of the Criminal Procedure Code, in which he alleged that the order passed by the Deputy Magistrate of Nuddea on the 24th of June 1879, dismissing a complaint of illegal confinement under section 220 of the Criminal Procedure Code, was illegal and should be reversed, a rule was issued by Mr. Justice MORRIS and Mr. Justice PRINSEP on the 12th of September last, calling upon Jadubar Mookerjee, a Sub-Inspector, to show cause why the order should not be set aside and the trial proceed.

The complainant in this case had been confined without sufficient cause and illegally, as found by the Deputy Magistrate, by the accused, who professed to act under section 93 of the Criminal Procedure Code. Inasmuch, however, as this was the accused's first fault, and, in the opinion of the Deputy Magistrate, it had arisen from a misconception of the law, the complaint was dismissed under section 220 of the Criminal Procedure Code,

On the rule coming on for hearing before the High Court,

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Baboo *Nil Madhub Bose* appeared to show cause.

In re
JADUBAR
MOOKERJEE

Baboo *Umakali Mookerjee contra.*

Judgment.

In discharging the rule, the Court (1) passed the following order:—

It is important to see exactly what the question before us now is. It is raised by a letter of reference from the Magistrate, who is dissatisfied with the order passed by the Deputy Magistrate upon the facts found by him. He says: "A charge having been drawn, the Deputy Magistrate was bound by section 220 of the Procedure Code to acquit or convict."

The statement is correct that there was a charge drawn up and the law laid down by the Magistrate is also correct, *viz.*, that the Deputy Magistrate was bound to acquit or convict. But he goes on: "Accordingly, he was wrong in dismissing the case only," implying that there was neither an acquittal nor a conviction, but a dismissal of the case, not amounting to either. A rule accordingly was issued to show cause why the order of the Deputy Magistrate, dated the 24th June, dismissing the complaint of illegal confinement should not be set aside and the trial proceed.

We have now the whole record before us, and it seems to us quite clear that the Magistrate is under a misapprehension when he states that there was neither an acquittal nor a conviction.

The Deputy Magistrate, on the facts before him, rightly or wrongly made the order that the case be dismissed under section 220. Now, the dismissal of a case under section 220 can only be an acquittal, so that the Deputy Magistrate has acquitted the accused.

If that order of acquittal is wrong, the Government has its remedy by appeal, but the propriety of the acquittal is not before us. On this ground we think that we should not interfere with the order made by the Deputy Magistrate, and that the rule should be discharged.

[CRIMINAL JURISDICTION.]

1879

IN THE MATTER OF GRISH CHUNDER TALOOKDAR.

Cross-examination of witnesses called by the Court.

The Court ought not to refuse to allow the cross-examination of a witness called by it.

THIS was an appeal from a conviction passed by the Sessions Judge of Rajshahye, on the ground, *inter alia*, that the Judge had refused to allow the cross-examination of a witness called by the Court, and that the prisoner had been seriously prejudiced thereby.

H. Bell and *Baboo Gopaul Lall Mitter*, for the Prisoner.
Baboo Ram Chunder Mitter, for the Crown.

The judgment of the High Court (1) was as follows:—

The appellant has been convicted by the Court of Session at Rajshahye of having abetted the commission of forgery, and has been sentenced to imprisonment for three months and to a fine. The appeal has been argued by Mr. Henry Bell, who, I understand, also defended the prisoner before the Court below, and the learned Counsel impugns the conviction on several grounds. He contends that, in the first instance, no legal offence has been established against the prisoner. He also contends that the evidence for the prosecution is untrustworthy, and further that it is greatly outweighed, both in point of respectability and certainty, by the evidence for the defence. He contends in particular that the principal witness in regard to the actual fact of abetment, that is to say, Mahomed Mohsim, is a tainted witness; that he ought not to be believed; that his evidence is improbable and

(1) JACKSON and TOTTENHAM, J. J.

full of discrepancies, and more especially is discrepant with that of Mohsim's son, Ahmed Hossein, who also gave evidence in support of Mohsim's statement. The learned Counsel contends also that the affirmative case set up for the appellant, *viz.*, that the sum of money secured by the bond of which the forgery is said to have been contemplated, had been, in fact, paid by Dino Nath Singh before his death, and that consequently there was no necessity for the prisoner taking the very serious and dangerous step which he is said to have taken, has been sufficiently proved. In addition to these arguments, founded upon the evidence, the learned Counsel submitted to us that the prisoner has been seriously prejudiced by the procedure of the Court of Session in two particulars, one being the refusal of the Sessions Judge to allow the cross-examination of a witness who was called by the Court, and, secondly, an act done by the Sessions Judge during the trial which was calculated, not only to disclose prematurely the Judge's opinion in respect of the case, but also to discourage the assessors from entertaining a contrary opinion.

[The Court here dealt with the first of the legal objections argued.]

Then, as to the alleged defect in the procedure of the Court of Session, we have no doubt that the Sessions Judge was wrong in refusing to permit the cross-examination of the witness called by the Court. The ordinary practice in properly-constituted Courts is, that where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him; and certainly when the Judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination.

Then the question arises whether the refusal of the Sessions Judge in this instance has prejudiced the prisoner. Now, it appears to us, considering what the matter was which the witness who was a police-officer had been called to prove, and as to which his cross-examination was desired by the prisoner, that the sub-

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ject is of so outside a character, if I may so express myself, that really neither the examination by the Judge, nor any possible cross-examination by the prisoner, could have affected the result. It is restricted entirely to a point to which I shall presently advert, *viz.*, as to the conduct of one of the witnesses, Mohsim's son, and the possible custody of the papers which were given to Mohsim at a particular time before they were seized by the police.

[The Court then proceeded to deal with the merits of this case, and in the end affirmed the conviction of the lower Court.]

[CRIMINAL JURISDICTION.]

Sept. 10th.

EMPRESS

AND

No. 982 of
1879.

DHUNIRAM

*Criminal Procedure Code (Act X. of 1872), section 491—Breach of peace—
Adjournment of Proceedings, Effect of—Discharge.*

An order postponing proceedings instituted under section 491 of the Code of Criminal Procedure (Act X. of 1872) until the person called upon to show cause shall have established in a Civil Court the title claimed by him to the property disputed, with reference to which there is a likelihood of a breach of the peace, amounts to a discharge.

CRIMINAL REFERENCE under section 296 of the Code of Criminal Procedure submitted by the Sessions Judge of Patna.

Mr. M. L. Sandel, for the Prisoner.

The circumstances under which the reference was made appear from the following judgment thereon by the High Court (1):—

It appears that one Dhuniram was called upon to show cause why he should not be bound down to keep the peace by the Deputy Magistrate of Behar. On his appearance he set up a deed upon which he laid claim to be in possession of a certain property in dispute. Thereupon the Deputy Magistrate passed

(1) MORRIS and PRINSEP, JJ.

the following order: "I order him to have the deed declared valid by the Civil Court, and that he is in possession as Thikadar. Till he has this matter settled in the Civil Court, this case will be adjourned. As a proof of his good faith he should institute the case in the Civil Court."

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Judgment.

The Deputy Magistrate also passed an order requiring Dhuniram to attend daily at this Court on a recognizance of Rs. 1,000, and this order was kept in force notwithstanding the postponement of further proceedings.

It appears to us that if it was necessary to proceed against Dhuniram under section 491, the proceedings ought to have been brought to an early termination. The likelihood of his committing a breach of the peace would in no way depend upon his instituting a case in the Civil Court to establish his right under a certain deed, and any order postponing further proceedings until he did this, could, in our opinion, amount only to a discharge so far as those proceedings were concerned. It was both inconsistent and arbitrary to require Dhuniram to institute a suit, and at the same time to insist upon his daily attendance in the Criminal Court under very heavy recognizance, and for no apparent reason. We hold, therefore, that the order of the Deputy Magistrate postponing further proceeding amounting to a discharge, and we direct that Dhuniram be relieved from further attendance in the Deputy Magistrate's Court, and that this personal recognizance be discharged. It will, of course, be open to the Deputy Magistrate, should the necessity arise to institute fresh proceedings under section 491.

[CRIMINAL REVISIONAL JURISDICTION.]

October 6th.
 No. 228 of
 1879.

IN THE MATTER OF CHUNDER NATH DEB. } PETITIONERS.
 AND OTHERS }

Appeal, Right to withdraw petition of.

A petition of appeal presented for admission may be withdrawn.

THIS was an application to have an order made in appeal by a Sessions Judge, enhancing a sentence passed by the Deputy Magistrate upon the petitioners, on the ground that the petitioners had applied to have the appeal withdrawn on the day fixed for the admission or rejection of their petition of appeal before the same had been admitted, and that the Judge had not only refused their application, but, on the appeal being heard, had enhanced the sentence.

M. Ghose, for the Prisoners.

Baboo Ram Charun Mitter, for the Crown.

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NATH DEB.

The following order was made by the High Court (1) :—

Judgment.

We think the order of the Sessions Judge enhancing the sentence passed on the prisoners by the Deputy Magistrate must be set aside.

It appears that a petition of appeal was presented by the prisoners against the conviction by the Deputy Magistrate, and a day was fixed for the admission or rejection of the said appeal. On the day so fixed, and before the appeal was admitted, the Judge having expressed an opinion relative to the enhancement of the sentence, if the conviction were upheld, the appellant's Yakeel proposed to withdraw the petition of appeal, but the Sessions Judge declined to allow him to do so, on the ground that there was no provision in the Code to that effect.

It seems to us that every privilege given to a party by the law may be waived at the option of that party. A right to appeal is a privilege given by the law, and the party concerned is at liberty to insist upon, or abstain from, the exercise of that right. The Sessions Judge, we think, ought not to have insisted upon the appeal being admitted, and to have enhanced the sentence upon such appeal. If he had reason to think that the sentence passed by the Court below was inadequate, his proper course was to follow the procedure laid down in section 296, and refer the matter to this Court. The order of the Court of appeal enhancing the sentence, therefore, will be set aside, and the conviction and sentence of the Deputy Magistrate will stand. The prisoners whose term of imprisonment has expired will be released.

(1) WILSON and TOTTENHAM, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

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IN THE MATTER OF TÖKEE BIBEE vs. ABDÖOL KHAN.

Dec. 14th. Insolvent Act (11 and 12 Vict., c. 21), section 13—Protection Order—
Presidency Magistrates Act (IV. of 1877), section 234—Maintenance,
Arrears of, whether a "debt or liability."

Under a protection order granted by the Insolvent Court under section 13 of the Insolvent Act (11 and 12 Vict., c. 21), an insolvent is protected from arrest or imprisonment in respect of arrears due for maintenance ordered by a Presidency Magistrate under section 234 of Act IV. of 1877, when such arrears have been included in his schedule.

Quære.—Whether the protection applies to arrears of maintenance accruing due subsequently to the making of the schedule.

IN this case an application under section 147 of the High Courts Criminal Procedure Code was made to Mr. Justice WILSON, sitting as a Judge on the original side of the Court, that a proceeding before one of the Presidency Magistrates should be transferred to the High Court for the purpose of having the order made therein quashed.

The facts of the case were as follow: In 1878, Tokee Bibee, the wife of Abdool Khan, instituted proceedings against him for maintenance under the Presidency Magistrates Act (IV. of 1877), and by an order of the 5th June 1878 he was ordered to pay her Rs. 15 a month. On the 10th May 1879, Abdool Khan filed his petition in insolvency, and the usual vesting order was made. On the 10th June he filed his schedule. At that time there were arrears of maintenance due, including the amounts payable in April and May, and these arrears were inserted in the schedule. On the 1st July the insolvent applied for *interim* protection, and the hearing was adjourned until the 12th August with protection in the meantime. On the 12th August he applied for his personal discharge, and the hearing was adjourned for six months with protection in the meantime.

On the 3rd July, the wife commenced proceedings before the Magistrate under section 234 of the Presidency Magistrates Act to enforce payment of the April and May arrears of maintenance.

The insolvency proceedings were brought before the Magistrate. He was of opinion that they were not a bar to his making an order under the section just mentioned, and on the 27th August he made an order that Abdool Khan should deposit in Court the April and May arrears, or undergo rigorous imprisonment for a fortnight in default.

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This was the order complained of.

Truvelyan, for the Insolvent.

Paul (Advocate-General), for the Government.

Tokee Bibee appeared in person.

Paul (Advocate-General).—Sections 47 and 61 of the Insolvent Act, which deal with the effect of a final discharge under the Act, have reference only to what may be called civil liabilities. The words used are “debts or liabilities” and “debts, claims, or demands.” The maintenance ordered by the Magistrate cannot come within these words. Nor does it come within the description of debts proveable in bankruptcy under section 31 of the English Bankruptcy Act of 1869, for it is not a liability which can be ascertained, the time of maintenance being indefinite. [As to what a debt is, see Debtors Act, 1869 (32 and 33 Vict., c. 62), sections 4 and 5, and *Harvey vs. Hall*, L. R., 11 Eq. 31.] An order in a criminal case for the payment of money is in the nature of a penalty, and disobedience to the order is a contempt of Court—*Martin vs. Lawrence*, L. R., 4 Cal. 655.

In *Hewitson vs. Sherwin*, L. R., 10 Eq. 53, it was held that an order by the Court for payment of costs constituted a debt within the Debtors Act, 1869, but that was a civil case.

If section 13 of the Insolvent Act be taken by itself, the word “liability” is wide enough to include the order in this case, but the words already referred to as used in the other sections of the Insolvent Act clearly point to civil debts.

Truvelyan.—There are decisions, which support my contention as to analogous orders made by the Divorce Court for alimony—see Brown on Divorce, p. 134. In *Dickens vs. Dickens*, 51 L. J. P. and M. 183, it was held that, under an order for discharge under the Bankruptcy Act, 1861, a bankrupt was protected from proceedings to enforce payment of alimony for the non-

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The order here, I submit, is a civil process exercised merely as a matter of convenience by the Police Court for securing payment of money which the insolvent was found liable for.

The money here due for maintenance does not come within the liabilities excepted from the order of discharge by section 62 of the Insolvent Act.

As to what is a civil and what is a criminal proceeding, see *Eglinton's* case, 2 Ell. and B. 717; *Reg. vs. Governor of Newgate*, 6 B. and S. 376. See p. 391.

[WILSON, J.—Has it not been held in England that bastardy proceedings before Justices are not criminal but civil proceedings?]

[*Paul*.—It was so held in the case of *Reg. vs. Fletcher*, L. R., 1 C. C. 320.]

This case is analogous to cases in England, of warrants for non-payment of poor rates which, it would appear, were discharged by a protection order under section 112 of the English Bankruptcy Act of 1861.—See 2 Archbold's Bankruptcy 907.

(The case of *Bancroft vs. Mitchell*, L. R., 2 Q. B. 549, was also referred to.)

The following judgment was delivered by—

WILSON, J. WILSON, J.:—

This was an application under section 147 of the High Courts Criminal Procedure Act to transfer to this Court a proceeding before a Presidency Magistrate for the purpose of quashing an order made therein.

(The learned Judge then stated the facts as above, and proceeded as follows:)

The section under which maintenance may be ordered (section 234 of the Presidency Magistrates Act) is as follows:—

“If any person, having sufficient means, neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, a Presidency Magistrate may, upon due proof

thereof by evidence, order such person to make a monthly allowance for the maintenance of his said wife, or child, or both, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

"Such allowance shall be payable from the date of the order.

"If any person so ordered wilfully neglects to comply with the order, a Presidency Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for each month's allowance remaining unpaid, to imprisonment for any term not exceeding one month.

"Provided that if such person offers to maintain his wife on condition of her living with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife, and may make the order allowed by this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

"No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if without sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent."

The section under which an *interim* protection is granted is section 13 of the Insolvent Act (11 and 12 Vict., c. 21). It is as follows:—

"And be it enacted that in any case where a petition shall have been presented by an insolvent debtor as aforesaid, or an act of insolvency shall have been adjudged to have been committed as aforesaid, it shall be lawful for the said Court, after the filing of the schedule required by this Act, if, under the circumstances, it shall appear proper, to make an interim order for the protection of the insolvent from arrest, and any such interim order may apply either to all the debts or liabilities mentioned in the said schedule, or to any of them, as the Court may think proper, and may commence and take effect at such time as the Court shall direct, and any such order may be recalled,

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and may be renewed as to the Court may appear proper, and any such order, when so made, shall protect the person to whom it shall be given from being arrested or detained in prison for any debt or liability to which such order shall apply within the limits of the towns of Calcutta, Madras, and Bombay, respectively, or any other place within the territories under the Government of the East India Company; and any person arrested or detained contrary to the tenor and effect of any such order shall be entitled to his discharge out of custody upon application to any Court or Judge which or who shall have power to set at large persons illegally detained in custody under the process, by virtue of which such person shall have been arrested or be so detained. Provided always that no such order shall operate as a release or satisfaction of the debt or demand of any creditor, nor prejudice the right of any such creditor to arrest the insolvent whether he shall or not have been previously arrested for the same debt or demand, in case the order shall be recalled, or shall fall by reason of the petition of the insolvent being dismissed or the adjudication being reversed."

The Advocate-General argued that, in determining what is a "debt or liability" under this section, we must look forward to the later sections dealing with final discharge, namely, section 47, which, instead of "debt or liability," uses the words "demand" and "debt or demand," section 61 which again changes the phrase to "debt, claim, or demand," and section 62 which excepts certain matters from the operation of the Act.

It could hardly be seriously contended that section 62 applies; maintenance ordered to be paid is not a fine, penalty, or forfeiture.

But it was said the language of sections 13, 47, and 61 points to matters purely civil, not to anything of a criminal character, and that the liability now in question is a criminal liability. Two grounds were given for saying that the liability is a criminal one; first, because the whole proceedings are before a Criminal Court; secondly, because non-payment of maintenance may be punished with rigorous imprisonment. Now, the precise liability in question is the liability to pay sums of money which have become payable under an order for main-

tenance. That is, *prima facie*, a purely civil liability, and a debt or liability, or claim or demand, within the meaning of the Insolvent Act. The fact that the debt is created, and may be enforced by a Criminal Court, cannot affect the matter. Many purely civil rights are, for convenience sake, made enforceable in Criminal Courts. Nor, in my opinion, does the fact that penal consequences have been attached to the non-payment of a debt make it less a debt. Bastardy proceedings before Justices have been held in England to be civil not criminal proceedings. *Regina vs. Barry*, 28 L. J. M. C. 86, *Regina vs. Fletcher*, L. R., 1. C. C. 320. And this case is very similar.

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I think that the arrears of maintenance included in the schedule are a debt or liability within the meaning of section 13. of the Insolvent Act, and that the protection-order protected the insolvent from arrest or imprisonment in respect of it. The proceedings will, therefore, be removed into this Court, and the Magistrate's order quashed.

I say nothing as to the effect of the insolvency proceedings upon any maintenance accruing subsequently to that in the schedule, and of course there is nothing in this decision to interfere with the Magistrate's discretion under section 235 of the Presidency Magistrates Act.

[CRIMINAL JURISDICTION.]

1880 IN THE MATTER OF A. DAVID PETITIONER.

February 2nd. Criminal Procedure Code (Act X. of 1872), section 458—Procedure—Evidence of one prisoner against another tried jointly.

Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other.

IN this case Mowla Bux was charged before a Bench of Magistrates with criminal breach of trust as a servant, under section 408 of the Indian Penal Code, and A. David with receiving stolen property, under section 411 of the Code.

The two prisoners were tried together.

Mowla Bux made a free and full confession. He admitted that he first sent to A. David nine bottles of wine; then six empty and six full bottles, and again seven bottles of wine for sale. He further admitted that the wine and bottles belonged to the District Magistrate, Mr. Porch, in whose service he was. From the evidence of Mr. Porch it appeared that Mowla Bux absconded, and that thereupon, on stock being taken of the contents of the cellar, it was found that a large quantity of wine had been stolen.

The other prisoner A. David, who was a shopkeeper, denied the charge made against him.

The Bench of Magistrates was of opinion that, as the prisoners were charged with separate offences, under section 30 of the Evidence Act, Mowla Bux's statement could not be used as evidence against the other prisoner. They thought, however, that there was independent evidence against David, and upon that found him guilty, and sentenced him to six months' rigorous imprisonment and a fine of Rs. 100. From this conviction and sentence he appealed to the Sessions Court at Rajshahye. By that Court the case was remanded by an order in the following terms: "It does not appear that the two men were tried jointly or for the same offence. There is no objection to the prisoner Mowla Bux being examined as a witness.

The examination of the thief in order to convict the receiver is by no means an unusual practice. •

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“The case must be remanded to the Bench in order that Mowla Bux may be examined, the prisoner David being allowed to cross-examine him.”

The appellant then presented a petition to the High Court, and a rule *nisi* was thereupon directed to issue to the Legal Remembrancer, to show cause, on behalf of the prosecutor, why the order of the Judge should not be set aside as being contrary to law, an order being made at the same time to stay further proceedings before the Bench of Magistrates.

The Junior Government Pleader showed cause.

Piffard, contra.

The judgment of the Court (1), which was as follows, was delivered by—

MORRIS, J. :—

MORRIS, J.

In this case we think that the Judge in appeal was clearly in error in stating that it does not appear that the two men, Mowla Bux and Arthur David, were tried jointly.

On referring to the original record, we find that the prisoners, Mowla Bux and Arthur David, were tried together, the one as the thief of certain bottles, and the other as the receiver of those articles, knowing them to be stolen property. The Bench of Magistrates was, in our opinion, right in coming to the conclusion that the statement of Mowla Bux could not be used as evidence against David. The two prisoners were, strictly speaking, being tried together for different offences committed in the same transaction (see section 458, Civil Procedure Code). In such a trial it seems to us that it would be altogether improper and illegal to take one prisoner from the dock and examine him as a witness against the other prisoner; and, further, if the Court which tried the prisoners had not the power to admit the one prisoner as a witness against the other, it seems to follow as a necessary

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consequence that the Court of Appeal cannot have more power in this respect than the Court of Original Jurisdiction.

In this view we consider that there was a material error in the order of the Judge, directing additional evidence to be taken by the examination of the prisoner Mowla Bux as a witness. We therefore cancel his order, and direct that the record be returned to the Sessions Judge in order that he may decide the appeal upon the evidence as it stands on the record.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF SHEIKH DABU.

Criminal Procedure Code (Act X. of 1872), section 119.

Where the accused was charged under section 193 of the Penal Code with having given false evidence, in that he denied having made certain statements which he was alleged to have made to the Inspector of Police, that officer was examined, and merely put in two documents containing the statements alleged as the records of what had taken place. *Held*, that these documents being inadmissible in evidence under section 119 of the Code of Criminal Procedure, evidence ought to have been given as to what was actually stated by the accused to the Inspector of Police.

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APPEAL from a conviction and sentence passed by the Officiating Judicial Commissioner of Chota Nagpore.

The appellant Sheikh Dabu and Mussamut Jumni were charged under section 193 of the Indian Penal Code, with intentionally giving false evidence in a judicial proceeding.

The statements made by them on solemn affirmation which were alleged to be false were recorded by the Deputy Commissioner. It appeared that the accused had previously made inconsistent statements to the Inspector of Police. These statements were recorded by him in documents marked A and B.

Before the Judicial Commissioner the accused denied that they had made the statements alleged to have been made before the Inspector.

In order to prove that the statements had been made, the alleged Inspector was called as a witness, and in examination put in the two documents A and B, as the records of what had taken place. Another witness who was present was also called, and he corroborated the evidence of the Inspector.

The accused called no witnesses.

Under these circumstances, the Judicial Commissioner found the charge proved, and sentenced the male prisoner to one year, and the female prisoner to three months' rigorous imprisonment.

The male prisoner now appealed to the High Court.

The following judgment was delivered by the Court (1):—

We think it impossible to sustain this conviction. Apart from the supposed evidence afforded by the Inspector of Police and the exhibits A and B, there is not enough to prove the offence charged against the appellant. But exhibits A and B are not admissible in evidence, *vide* section 119, Code of Criminal Procedure, and the Inspector of Police does not say *what* was stated to him by the accused. He merely refers to A and B as containing their statements. The conviction must, therefore, be set aside and the appellant Sheikh Dabu, must be released.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF DHAM MUNDUL AND OTHERS . APPELLANTS.

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Feb. 25th.*Cross-examination, Refusal of right of—Criminal Procedure Code (Act X. of 1872), sections 186 and 249.*No. 88 of
1880.

A, B, and C having been charged with murder before a Magistrate, two vakeels presented their vakalutnamas, and applied to be allowed to conduct the defence of the accused.

The Magistrate refused permission, and after recording the depositions of the witnesses, committed the accused to take their trial before the Sessions Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses, who, on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. Two of them denied having made the statements recorded, while the third admitted the statements attributed to him, but asserted they were false and made under pressure. The Sessions Judge, disbelieving the statements made in his Court, thereupon under section 249 of the Code of Criminal Procedure (as amended by section 20 of the Amending Act) used the previous depositions as evidence in the case, and mainly upon these convicted the accused of murder and sentenced them to transportation for life. Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions.

The High Court affirmed the conviction and sentence.

APPEAL from a conviction and sentence passed by the Sessions Judge of Mymensingh.

In this case Dham Mundul, Mohur Sheikh, and Kurim Sheikh, were charged under section 302 of the Indian Penal Code, with the murder of one Tariffullah.

The evidence before the committing Magistrate showed that the deceased had an intrigue with one of the witnesses Nikjan, the wife of another witness, Affan. It appeared that Affan had been aware of the intrigue, and informed his brother, the prisoner Kurim.

On the morning of the 2nd of Assin, Tariffullah told Affan that he was going to the hât in the afternoon, and intended afterwards to go on a visit to his brother who lived some distance off. Whether

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he actually went to see his brother did not appear, but at midnight he entered the hut where Affan and Nikjan were sleeping. Kurim, it seems, had found out that Tariffullah had returned, and suspecting the cause had told the other two prisoners who were his uncles and lived in the next house.

Tariffullah had only been in the house for a short time, when Affan and Nikjan heard the three prisoners speaking in low tones under the north-end of the hut. Tariffullah had also heard them; suspecting that he was being watched he endeavoured to escape, but as he emerged from the hut, he was seized by the three prisoners and beaten and dragged off.

Both Affan and his wife witnessed the beating, but there was nothing to show that the former knew that Tariffullah had been seized as he emerged from his hut. The three prisoners dragged Tariffullah away to the eastward, and Affan alleged that he saw them take the body across the river which is close to Kurim's house, and then lost sight of them.

On the following morning Nikjan on going to the river saw the body, lying face downwards, on the other side of the river near a village occupied by certain manjhis. The witnesses who gave the above evidence were Affan, Nikjan, and one Musa.

Some manjhis of the village gave evidence that they had discovered the body which they recognized to be that of Tariffullah, but fearing that suspicion might rest upon themselves, they carried it away and hid it in a field belonging to another mouza. There were no marks, they said, of violence on the body.

The body was subsequently discovered in the field where the manjhis alleged they had hidden it.

On the trial before the Magistrate, two vakeels produced their vakalutnamas, and applied to be allowed to conduct the defence. The Magistrate refused permission, saying that the proceedings in his Court were merely preliminary to commitment, and that there would be no use in their appearing before him. There was, therefore, no cross-examination of the witnesses in the Magistrate's Court. In the end, that officer committed all three prisoners to take their trial before the Sessions Court.

On the case coming on for hearing before the Sessions Court, the three witnesses—Affan, Nikjan, and Musa—who spoke to the

act of the beating, denied all knowledge of any such beating. Two of them denied that they had made the statements recorded by the Magistrate, while the other admitted the statements attributed to him, but alleged that they were false, and had been made under pressure.

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The Sessions Judge entirely disbelieved the statements made by these witnesses before him, and allowed the depositions taken by the Magistrate to be put in evidence under section 249 of the Code of Criminal Procedure.

The vakeels for the defence had objected that these depositions were not admissible, as they had not been duly taken by the Magistrate in the presence of the accused person, inasmuch as the Magistrate had refused to allow the vakeels for the prisoners to appear in his Court to cross-examine the witnesses.

The other evidence before the Sessions Judge was substantially that given in the proceedings taken by the Magistrate.

One of the assessors who sat in the Sessions Court was unable to specify the section under which he would convict, but found that all three prisoners were guilty "of having beaten the deceased Tariffullah so as to make his death very probable."

The other assessor found all three guilty under section 304 of the Indian Penal Code.

The Judge, however, disagreed with both assessors, and found the prisoners guilty of murder under section 302, and sentenced them to transportation for life.

Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the depositions taken before the Magistrate ought not to have been used before the Sessions Court, as the prisoners had been deprived, by the refusal of the Magistrate to allow their vakeels to appear, of the right of cross-examination.

Baboo *Kali Churn Banerjee* appeared for the Appellants.

The judgment of the Court (1) was delivered by—

JACKSON, J. :—

JACKSON, J.

The principal part of the evidence in this case—in fact, the only

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material part of the evidence—is that of the witness Nikjan and her husband, and the witness Musā. These persons before the Magistrate deposed very clearly to facts which can leave no doubt whatever as to the guilt of the persons charged, and in fact completely made out the case for the prosecution against them. But these persons, when called as witnesses in the Court of Session, made statements entirely different from what they had made before the Magistrate, in fact repudiated those statements. Only one of them admitted that he had made those statements, but under pressure. The Sessions Judge thereupon, under the power vested in him by section 249 of the Code of Criminal Procedure as amended by section 20 of the Amendment Act, used the previous depositions of these persons as evidence in this case, and it is objected before us that those depositions ought not to have been so used because they were given without cross-examination, in consequence of the committing Magistrate having refused to allow pleaders to appear before him on behalf of the accused. There can be no doubt that such an application was made before the Magistrate, and that he, at any rate, discouraged, if he did not absolutely refuse to allow, pleaders to appear before him, and the Sessions Judge, adverting to this circumstance, has pointed out that the Magistrate therein acted in direct contravention of section 186 of the Code of Criminal Procedure. Now, as to this objection, I observe that it is not taken before us precisely in the same form as it was urged in the Court of Session. It does not seem to have been seriously contended before the Court of Session that what the Magistrate did had deprived the prisoners of the benefit of cross-examination. All that was said there was, that the depositions ought not to be used because they were not duly taken in the presence of the accused persons, and it seems to have been contended or suggested that because the accused persons were there *in propria persona*, and were not represented, as they desired to be, by pleaders, they were not regularly present, and the evidence was not duly taken in their presence. However, putting that aside, we are inclined to think that there is, really no force in the objection. It does not appear that the pleaders who were retained by the accused made any attempt to cross-examine the witnesses, for they might have

suggested to the accused the proper questions to be put to the witnesses; nor in fact are we disposed to think that at that stage of the proceedings, cross-examination, if resorted to, would have been of any benefit to the accused. Very probably it would not, the Court thinks, have been resorted to at all. Then the question is, ought the evidence to be believed as it stands? The Court is of opinion that it is so probable, so consistent with what the Judges know to be the condition of life amongst Mahomedans of the lower classes in the Eastern districts, that it can in the main be believed, and what has since taken place, *viz.*, that influence has been brought to bear upon the witnesses with a view to closing their mouths, confirms us in the belief. We, therefore, have no doubt that the statements of the witnesses, made before the Magistrate, are, in substance, true; that the accused persons did actually kill the deceased Tarkfullah; and that it was his body that was found as described. The Court has then to consider whether the offence is murder. Regard being had to the nature of the evidence given, and to the declaration made by the accused at the time when the assault was made, we think it probable that they did intend some bodily injury which was likely to cause death. We, therefore, cannot shrink from the conclusion that the offence was murder, and, therefore, as a Court of Appeal, we are bound to affirm the conviction and the sentence of the Court below.

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*In re*DHAM
MUNDUL.*Judgment.*

JACKSON, J.

[CRIMINAL JURISDICTION.]

Mar. 2nd. IN THE MATTER OF KHERODE CHUNDER MO. } PETITIONER.
 No. 27 of ZUMDAR }
 1879.

*Indian Penal Code (Act XLV. of 1860), sections 196 and 471—Jurisdiction of
 Magistrate.*

A Magistrate has no power, under section 196 of the Indian Penal Code, to convict an accused person who has been found to have used as evidence a document which he knew to be a forgery, but is bound to commit him to the Court of Session, the offence being properly cognizable under section 471 of that Code—*Reg. vs. Oodeen Lall*, 3 W. R. Cr. Rul. 17, disapproved of.

THIS was an application to set aside a conviction passed under section 196 of the Indian Penal Code.

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The petitioner, it seems, was charged with having used as evidence in a case a document to which he had added the names of two of his servants as witnesses, and had changed the original date from 1281 to 1282, with a view to saving limitation.

The Magistrate before whom the case was heard found the charges proved, and convicted the petitioner. From this conviction an appeal was preferred on the ground that it was against the weight of evidence, and further that the Magistrate had no jurisdiction.

The appeal having been dismissed, the present application was made.

Ghose and Baboo Aukhil Chunder Sen, for the Petitioner.

The judgment of the Court (1) was as follows:—

It appears to us that this was properly a case cognizable under section 471 of the Indian Penal Code, and not under section 196, and that consequently the Magistrate had no jurisdiction to convict, but ought to have committed the prisoner for trial to the Court of Session. We observe that there is an early case, *Reg. vs. Oodeen Lall*, 3 W. R., Cr. Rul., 17, in which incidentally a conviction in a case somewhat resembling the present appears to have been held legal under section 196, but there the conviction had taken place before a Sessions Judge with the aid of a jury, and the question of jurisdiction did not arise. We are not aware that that *dictum* has been followed in other cases, and that was a ruling by a single Judge. We think the conviction must be set aside, and that the Magistrate should commit the prisoner for trial.

(1) JACKSON and TOTTENHAM, 57.

[CRIMINAL JURISDICTION.]

1880.
April 22nd.

EMPRESS vs. KALA CHAND DASS AND OTHERS.

Criminal Procedure Code (Act X. of 1872), sections 505, 510—Bad livelihood—Security for good behaviour—Sureties—Cash Deposits.

Seven persons were charged, under section 505 of the Code of Criminal Procedure, with being persons of notoriously bad livelihood. Two only were proved to have been ever convicted of any substantive offence, and the convictions proved against them took place 30 and 32 years before, but it appeared that they had, in 1867, been imprisoned for three years as budmashes in default of finding security.

The Magistrate, under section 510 of the Criminal Procedure Code, ordered each of the seven accused to find two sureties to the amount of Rs. 500, three of them to deposit in cash Rs. 1,000 each, two of them Rs. 500, and the remaining two Rs. 250, and in default to have rigorous imprisonment for one year.

The High Court *held* that it was illegal to require the accused to deposit cash instead of giving bonds as security for good behaviour, and that the order of the Magistrate as to sureties was prohibitive. It accordingly quashed the orders requiring the deposits of cash and the finding of sureties, and directed that six of them (it being found that as to the seventh the Magistrate acted entirely without jurisdiction) should enter into bonds for their good behaviour in the amounts which they were directed to deposit in cash.

The sections of the Procedure Code relating to budmashes should be exercised with extreme discretion.

CRIMINAL REFERENCE under section 296 of the Code of Criminal Procedure.

The terms of the reference were as follow:—

"The accused persons were charged under section 505 of the Criminal Procedure Code with being persons of notoriously bad livelihood, and the Magistrate of the District, after holding a local inquiry, at which he examined witnesses for the prosecution and also for the defence, found the charge established.

The Magistrate passed the following order: "The order I now pass is that the prisoners Kala Chand, Ram Sagar, Nobin Haldar, Ram Kumar Dass, Poda Lochun, Raj Coomar Deb and Ram Kumar Deb, find two sureties in Rs. 500 each for their good beha-

viour for one year under section 505 of the Criminal Procedure Code. They are also required to furnish their own recognizances, the amount to be deposited in cash, Kala Chand, Ram Sagar, and Ram Kumar Deb Sigdar for Rs. 1,000 each, Raj Kumar Deb and Ram Kumar Dass for Rs. 500 each, and Nobin Haldar and Poda Lochun, vakeel, for Rs. 250 each. In default of compliance with this order, they, will, under section 510, undergo rigorous imprisonment for the period mentioned."

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DASS.
Judgment.

The portion of the order requiring the accused persons to deposit cash in lieu of a bond for good behaviour, appears to be bad in law.

The forms of the bond and security for good behaviour which are to be taken by the Magistrate, are prescribed in the second Schedule annexed to the Code of Criminal Procedure, and I find no authority for requiring cash to be deposited in lieu of a bond."

The following judgments were delivered by the Court (1):—

PONTIFEX, J.:—

PONTIFEX, J.

We agree with the Sessions Judge in this case that the order passed by the Magistrate, requiring the accused persons to deposit cash in lieu of taking a bond for good behaviour, ought to be set aside as bad.

As the case has come before us, I, speaking for myself, feel bound to make some observations on the Magistrate's decision. The Magistrate says that of the seven defendants, Nos. 1, 2, 6, and 7, have been before in jail as *budmashes*, but only two of them have ever been convicted of any substantive offence. The Magistrate further says that "it occurred to him that it would be well that the defendants should be called on to show, *what it was hardly likely could be the case*, that in the opinion of such respectable men as Bhaokally affords, they were making efforts to retrieve their character."

I must observe that the assumption of the Magistrate shown in this paragraph scarcely indicates a proper frame of mind in which to commence a judicial trial of the defendants.

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 DASS.
 Judgment.
 PONTIFEX, J.

Nor, if this was the disposition, with which the case was approached, is it likely that "respectable men" would have willingly come forward in support of the defendants, and so drawn the suspicion of the Magistrate on themselves. But, be that as it may, it appears that the Magistrate, after taking evidence on the spot *against* the defendants, remanded, as he calls it, the case to head-quarters, and then took the evidence for the defence. The Magistrate's words are: "For the defence twelve witnesses have been examined, their number and the difficulty of securing their attendance in time rendering me unable to dispose of the case at a single sitting." It seems to me that if the evidence against the defendants was taken on the spot, and the taking of the greater part of the evidence for the defendants was adjourned to head-quarters," this was a proceeding not very fair to the defendants.

The Magistrate further says: "Defendants 1 and 2 have some landed property acquired, it is not unjust to suppose, by the proceeds of a career of crime." Unless there was any evidence pointing that way, I feel bound to say it was extremely unjust to make any such supposition, and as a matter of fact there is evidence on the record showing that part at least of this landed property was inherited. But the whole tenor of the Magistrate's remarks shows that he did not approach or deal with this case as dispassionately as would have been desirable.

Again, the Magistrate says: "As to the antecedents of the other three, or at all events of Ram Sagar, information would doubtless be forthcoming in the records in the Court of Session if the offices were not now closed for the holidays"—an assumption which appears to me to be purely gratuitous and extremely unfair. The Magistrate also says: "The office-records, however, show convictions only in the case of Kala Chand and of Ram Coomar Deb; of these, the first has been twice in 1844, and in 1850, convicted of theft, the second was convicted in 1848, and both of them with Raj Coomar were, in 1867, imprisoned for three years in default of finding security as *budmashes*." So that substantive offences were found against only two of the defendants, and these were committed and punished 30, 32, and 36 years ago, and were further expiated by three years imprison-

ment for default of security in 1867. But, notwithstanding this expiation, these offences are now again paraded for the certain consequence of one more year's imprisonment. I cannot think that it is justifiable to work these sections in this manner. With respect to the defendant No. 5, the Magistrate finds "that he is what is called in Backergunge and Chittagong a 'torney,' that is, he nurses for his own private profit petty quarrels into criminal charges, and negotiates in the interest of the accused the suppression of really heinous offences. To this reputable business he joins the profession of a *kobiraj*, so that (it is difficult to see the *sequitor*) he is on his own showing a man against whom society should be protected."

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No doubt, No. 5 is, on his admission, as stated by the Magistrate, but which really is not borne out by the record, a by no means reputable character. But in my opinion section 505 is not intended to apply to a person of such character and reputation, and the Magistrate had no jurisdiction to deal with him under that section. And, speaking generally, the order passed by the Magistrate seems to me preposterous. The seven defendants are each required to find two sureties to the amount of Rs. 500 each, three of the defendants are required to *deposit* in cash Rs. 1,000 each, two of them Rs. 500 each, and the remaining two Rs. 250 each, and in default to have *rigorous* imprisonment for one year.

With respect to the deposit we agree with the Judge that the order is illegal.

With respect to the sureties it is prohibitive, for it is scarcely likely that 14 sureties, in Rs. 500 each, would be forthcoming in a place like Bhaokalty. My own experience in Calcutta, has shown me that respectable people in Calcutta, who have to provide sureties upon grant of letters of administration, have to pay heavy sums to the sureties; and I can only suppose that it would be greatly more expensive for reputed *budmashes* to provide sureties for their good behaviour. So that it comes to this, that the requirement of two sureties, to the amount of Rs. 500 each, for each of the defendants, will, in effect, be inflicting a heavy pecuniary fine upon them in a case only of suspicion and reputation.

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v.

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Moreover, if these cases are to be approached in the spirit with which the present has been decided, to become surety for a *budmash* will, of itself, be sufficient evidence to convict the surety of being himself a *budmash*.

Judgment.

PONTREUX, J.

Surely the putting in force of these very stringent sections should be exercised only with extreme discretion. In the present case the Magistrate points out incidentally the far more proper means of prevention. In the village in question, he says, "so bad indeed a few months back had things become, that it was considered necessary to station two constables who still remain there. * * * The accused are well known to have been in the habit of moving about the khaals at night in long canoes driven by paddles, whilst thefts were of frequent occurrence. *This of course was before the arrival of the Police, whose removal would simply be the signal for a return to the old state of things.*"

We quash the order of the Magistrate, directing the defendants to deposit cash, and to provide sureties, and, in lieu thereof, we direct the defendants Nos. 1, 2, 3, 4, 6, and 7, but not defendant No. 5, to enter into bonds for their good behaviour in the amounts which they were directed to deposit in cash. All the defendants will be immediately released from the rigorous imprisonment which it appears they are now undergoing for default in providing sureties and depositing cash.

McDo-
NELL, J.

MCDONELL, J. :—

I concur.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF JITBAHAN vs. BANSRUP DHOBİ.

Criminal Procedure Code (Act X. of 1872), section 530—Parties.

1880

No. 214 of
1880.

Where there is a dispute likely to lead to a breach of the peace concerning and, and proceedings are recorded and had under section 530 of the Criminal Procedure Code, no order should be made against one who is acting as the servant of another person who claims to have possession of the land, unless that other person is made a party to the proceedings.

CRIMINAL REFERENCE under section 296 of the Criminal Procedure Code, submitted by the Judicial Commissioner of Chota Nagpore.

The circumstances were these:—

On the 14th November 1879 Jitbahan, the complainant, presented a petition in the Court of the Deputy Commissioner of Lohardugga, stating that he held a zur-i-peshgi lease of a particular village from one Asaram, and that, while he was in possession under this lease, one Bansrup, the servant of Gunesh Sahu, who had purchased Asaram's rights in the village at auction, had taken possession, and was preparing forcibly to cut and carry off his crops,

On the following day, the petitioner and Bansrup both being present, the Deputy Commissioner recorded that he considered a breach of the peace was imminent, and ordered both to put in their written statements. The first party, Jitbahan, put his state-

1880
In re
JITBAHAN
v.
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Order

ment the same day, but Bansrup did not put in any statement. It appeared that he was imprisoned in another case on the same day. The case was then postponed for three days till the 18th, on which day it was taken up, and in the absence of Bansrup and Gunesh, and without any further enquiry or proceeding, decided in favour of Jitbahan, who was declared to be in possession.

Two days after this order was recorded, *i. e.*, on the 20th November, Gunesh, the master of Bansrup, petitioned the Deputy Commissioner, urging that he was in *bona-fide* possession of the property in dispute, praying that he might be heard and might be given an opportunity of bringing forward evidence in his behalf. This petition was disallowed on the 30th December, the Magistrate declining to re-open the case.

The following order was made by the Court (1) upon the reference :—

It is quite clear on the original complaint of Jitbahan, on which the Deputy Commissioner instituted proceedings under section 530, that Bansrup was acting as the servant of Gunesh, who had purchased certain rights in the village, and therefore Gunesh should have been made a party to the proceedings. It was certainly improper to decide the matter in the absence of Bansrup, who was in jail under sentence, and in the absence of Gunesh.

We, therefore, set aside the orders passed under section 530.

(1) PRINSEP and TOTTENHAM, JJ.

[CRIMINAL JURISDICTION.]

PRAYAG SINGH AND ANOTHER

AND

FUZOOL HOSSEIN AND OTHERS

1880
April 9th.No. 1314 of
1879.

Criminal Procedure Code (Act X. of 1872), section 530—Decree, Resistance to execution of—Possession—Civil Procedure Code (Act X. of 1877), Chapter XIX.

A Criminal Court ought not to interfere in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought, the procedure to be adopted in such cases being that provided in Chapter XIX. of the Civil Procedure Code.

CRIMINAL REFERENCE under section 296 of Act X. of 1872, submitted by the Officiating Judge of Patna.

The circumstances under which the reference was made sufficiently appear from the judgment of the High Court.

Mr. *R. E. Twidale*, for the Petitioner.

• Mr. *C. Gregory*, Contra.

The judgment of the High Court (1) was as follows :—

WHITE, J. :—

WHITE, J.

I think that, in accordance with the suggestion of the District Judge of Patna, the orders to which he has called our attention in his letter of the 19th December of 1879 should be set aside.

The orders referred to form parts of one order made by the Deputy Magistrate. It is dated the 29th of September in that year, and purports to be made under section 530 of the Code of Criminal Procedure.

The first part of the order purports to confirm Prayag in possession of the disputed land, but is based upon no evidence on the part of Prayag Singh that he was in actual possession either before or at the date of the enquiry.

(1) WHITE and MACLEAN, JJ.

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PRAYAG
SINGH
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HOSSEIN*Judgment.*

WHITE, J.

The evidence does not amount to more than this—that Prayag, under certain decrees against the former owner of the land, had, prior to the enquiry, been given symbolical possession of the lands by the Court in execution of those decrees.

Fuzool Hossein and Subhanah Hossein, who are called the second party in the proceedings before the Deputy Magistrate, were no parties to either of these decrees.

The Deputy Magistrate in his judgment finds “that the second party are resorting to force to keep Prayag out of his property.”

The Deputy Magistrate appears to think that in such a state of things he is bound to interfere under section 530. He says, after referring to the contumaciousness of the second party, “they, by force and show of criminal force are trying to keep Prayag out of the land which the Civil Court has given him possession of. The pleader for the second party actually argued that this was a purely symbolical affair, and carried no weight. No doubt, if contumacious men like Fuzool Hossein and Subhanah Hossein turn out with an unlawful assembly, and refuse to acknowledge such possession being given, nothing short of force on the part of the Civil Court will be of use, and this is a state of things that cannot be tolerated for a moment.” The Criminal Court may properly enquire into and punish a riot or an unlawful assembly if proved. But it altogether oversteps its province when, under section 530 of the Civil Procedure Code, it interferes in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought. And this is what the Deputy Magistrate has done in the present case.

The Civil Code, in Chapter XIX., sections 334, 335, prescribes the procedure to be adopted when resistance is offered to a purchaser under a decree in getting possession of immoveable property.

The second part of the order directs Fuzool and Subhanah each to give security in Rs. 1,000 to keep the peace towards the first party for one year. As the second part of the order was passed to prevent a breach of the peace by the second party in consequence of their being turned out of possession under the first part of the order, and as the effect of setting aside the first part

of the order will be to restore Fuzool and Subhanah to possession of the land which is the bone of contention between them, the second part of the order will fall with the first part, and the entire order of the 29th of September will be accordingly set aside.

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PRAYAG
SINGH
v
FUZOOL
HOSSAIN.

[CRIMINAL APPELLATE JURISDICTION.]

1880
Feb. 10th.
No. 795 of
1879.

ROSHAN DOSADH, JEWAN DOSADH, AND } APPELLANTS;
ETWARI DOSADH }

AND

EMPRESS RESPONDENT.

Misdirection—Evidence Act (I. of 1872), section 54—Previous convictions.

In a trial before a jury, where the accused was charged with being in possession of certain articles alleged to have been stolen, and which were found in his house, the complainant and another witness identified the articles as belonging to the former, but the accused claimed the property as his own. The Sessions Judge in charging the Jury said: "The fact that he (the accused) has been twice imprisoned for theft is also not without its weight, and should be taken into consideration when deciding as to the reliability of the evidence of identification." Held that this was a misdirection, as the evidence of the previous conviction to prove bad character was irrelevant and inadmissible.

Per Curiam.—The proper object of using previous convictions, except under special circumstances, is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence.

APPEAL from a conviction and sentence passed by the Sessions Court of Patna on a trial held by Jury.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows:—

We think that there must be a new trial in this case.

The three prisoners were charged under section 411 of the Indian Penal Code with having dishonestly been in possession of certain articles claimed by the complainant as property stolen from his house. A dohur and pugree were found with the prisoner Roshan. The complainant and a friend identified these as the property of the former. Roshan, on the other hand, stated that they were his, but his statement was unsupported by any evidence. The Sessions Judge was quite correct in putting it to the Jury "to say whether there is any reason to believe that they (the complainant and his friend) have made any mistake," but he was clearly wrong in adding, "The fact that he (Roshan) has been twice imprisoned for theft is also not without its weight,

and should be taken by you into consideration when deciding as to the reliability of the evidence of identification." Section 54 of the Evidence Act, though it declares that "the fact that the accused person has been previously convicted of an offence is relevant," also declares "that the fact that he has a bad character is irrelevant," except under certain circumstances which do not exist in the present case. The evidence of the prisoner's previous convictions has been treated by the Sessions Judge as evidence of his character, which he has told the Jury to consider in determining the value of his claim to the property found in his possession. In this respect the Sessions Judge has clearly misdirected the Jury, because this evidence was irrelevant and inadmissible. He should have merely pointed out to the Jury the conflicting claims to this property, and called upon them to determine which they believed, at the same time reminding them that the prisoner was entitled to the benefit of any reasonable doubt. We think that the prisoner Roshan has been prejudiced by this error, and that he ought to have a re-trial. Except under very special circumstances, none of which arise here, the proper object of using previous convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.

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ROSHAN
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v.
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Judgment.

* As regards the other two appellants, Etwari and Jewan, the only points for the consideration of the Jury were, whether the jewels produced in Court formed part of the property stolen from the complainant, and whether they were found in the houses of the prisoners, concealed, as described by the evidence to the house search. The prisoners denied their possession of those articles, and, therefore, it was most important that the Jury should be called upon to determine whether those articles were found in their possession. The Sessions Judge, however, has altogether omitted to direct the Jury to consider this point. His charge runs thus: "The fact that they, (the jewels) were found in their house concealed under and in a corn-bin shortly after the occurrences is certainly of great weight. There is nothing to show that the case was got up, or that the search was unfairly made." And again: "The jewels had undoubtedly been concealed in a somewhat suspicious manner in the house of Etwari and Jewan. You

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ROSHAN
DOSADH
v.
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 Judgment.

will take all these circumstances into your careful consideration, and say whether there is any reason to doubt that the articles found are the property of the prosecutor. If they are, and, as has been clearly shown, 'they were found in prisoners' house shortly after they were stolen, you will be quite justified in finding the prisoners guilty.'

We think that the case against these two prisoners has not been properly put before the Jury. The Sessions Judge has assumed facts, evidence of which he should have laid before the Jury, in order that they might find whether the property was or was not discovered in the possession of the prisoners under very suspicious circumstances. We, therefore, direct that these two prisoners also be re-tried.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF A. DAVID, *Petitioner.**Criminal Procedure Code (Act X. of 1872), sections 295, 296—Reference to
High Court.*1880
April 17th.
—
No. 1222 of
1879.
—

One of two prisoners, who were tried jointly before a Bench of Magistrates on the complaint of the District Magistrate, appealed to the Sessions Judge, and was acquitted. The District Magistrate thereupon, under sections 296 and 297 of the Criminal Procedure Code, transmitted the proceedings in the case to the High Court, and asked that they might be quashed on the ground that there had been a failure of justice.

Held that the Magistrate was not competent to refer the proceedings of a superior Court to the High Court.

THIS was a reference submitted by the Officiating Magistrate of Maldah, under sections 296 and 297 of the Code of Criminal Procedure, for the opinion of the High Court.

The proceedings in the earlier stages of this case have already been reported in 5 C. L. R., p. 574—In the Matter of *A. David*.

There the High Court, on the 22nd February, cancelled an order made by the Sessions Judge of Rajshahye, directing certain evidence to be taken by the Bench of Magistrates which had originally tried the case, and ordered him to decide the appeal upon the evidence as it stood upon the record.

The result was, that, on consideration of that evidence, the Sessions Judge acquitted the prisoner.

The Magistrate, whose property it was which had been stolen, and which was alleged to have been received by A. David with a guilty knowledge, thereupon referred the entire proceedings to the High Court with the following remarks:—

“It appears that two material errors have crept into the decision of this case, which have vitiated the whole proceedings, and thereby caused the failure of justice. One is an error in law, and the other is an error in the procedure. Both the Courts (the Bench as well as the Appellate Court) have not taken into their consideration the confession of the co-prisoner Moula

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In re

DAVID,

Statement,

Buksh, which, according to the opinion of the District Judge, as far as it can be inferred from his second judgment on appeal in this case, would have turned the scale against A. David, the co-prisoner. Both the Courts are of opinion that, though the prisoners Moula Buksh and A. David had been tried jointly under sections 381 and $\frac{381}{100}$, Penal Code, but convicted on different offences, *viz.*, one under section 408, and the other under section 411, Indian Penal Code, the confession of the former cannot be taken into consideration as against the other under section 30 of Act I. of 1872. But in this both the Courts appear to be in error. It is to be seen from the record in this case that the prisoners, Moula Buksh and A. David, had been sent up for trial by the police, charged under sections 381 and $\frac{381}{100}$ and Kristo under section 414, Penal Code, and were being tried together jointly for the same offence. They were tried jointly, the third accused, Kristo, was discharged, and the two other accused, Moula Buksh and A. David, were convicted under sections 408 and 411 respectively.

In case the High Court is of opinion that, though they were tried jointly, but as they were charged separately with different offences in the course of the trial, in this case section 30 of Act I. of 1872 does not apply; then there is another error which the District Judge adverts to in his second judgment, *viz.*, that the Court of first instance was wrong in trying the thief (Moula Buksh) and the receiver of stolen property (A. David) jointly.

If this view is correct, then this error in the procedure has caused a failure of justice. From what is seen in the record, Moula Buksh would, in that case, have been a competent witness against A. David had he been tried separately and convicted on his own confession, and then examined as a witness for the prosecution in the case against A. David.

If this view is correct, then, owing to this irregularity in the procedure by trying all the three prisoners guilty of different offences jointly, the ends of justice have been defeated, and the proceedings should, it seems, be quashed, and a new trial directed.

Further, the District Judge has set aside this conviction on the ground also that the prosecution has failed to prove that there was any guilty knowledge on the part of the prisoner A. David

in receiving the goods as proved, which receipt, the accused A. David denied, whereas upon the facts and probabilities of the case the Appellate Court ought to have inferred that there was guilty knowledge on the part of the prisoner A. David, as the established facts and probabilities under the circumstances warrant this legal presumption, there being no room for any other presumption from the established facts." .

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In re
DAVID.Judgment

Mr. S. J. Leslie and Baboo Womesh Chunder Banerjee appeared for A. David. •

The judgment of the High Court (1) was as follows :—

On the prosecution of a chuprasee in the service of Mr. Porch, Magistrate of Pubna, one Moula Buksh, his khansama, was convicted by a Bench of Magistrates under section 408, Penal Code, of criminal breach of trust. •

In the same trial one David was tried and convicted of dishonestly receiving certain bottles stolen by Moula Buksh. The trial of these two men together was perfectly legal under section 458, Code of Criminal Procedure.

David alone appealed to the Sessions Judge, who found that except the statement of Moula Buksh, which was not admissible under section 30 of the Evidence Act, because he and David were not tried jointly for the same offence, there was nothing to prove guilty knowledge against David. The Sessions Judge, however, considered that he might require the evidence of Moula Buksh to be recorded under section 282 of the Code of Criminal Procedure, and sent the case to the Bench of Magistrates that this might be done. The matter was brought before a Division Bench of this Court, which held that this order was contrary to law, and directed the Sessions Judge to proceed to try the appeal on the record. David was accordingly acquitted. •

Mr. Porch, who is the real complainant in this case, and who also holds the office of District Magistrate, has sent up the entire proceedings in this case both before the Bench of Magistrates and the Appellate Court of the Sessions Judge, and has asked for an order quashing the entire proceedings, and directing a new trial,

(1) PRINSEP and TOTTENHAM, 77.

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In re
DAVID*Judgment.*

"as there appears to have been a failure of justice" on the grounds set forth in a memorandum prepared by him.

In the first place we are of opinion that the District Magistrate was not competent to refer this case to us. Section 295 of the Code of Criminal Procedure authorizes him to call for, and examine, the record of any Court subordinate to him. In the matter now before us the District Magistrate criticises the judgment of the Sessions Court, the Court of Appeal to which he, as a judicial officer, is subordinate, and he desires to have the order of acquittal passed by that Court set aside, as well as the proceeding of the trial of Moula Buksh, who was convicted by the Bench of Magistrates.

We should at any time regret that a District Magistrate should assume such a position towards the Sessions Judge of his District, and in the present case we regret the action of the Magistrate, the more that he was himself personally interested in the case as real prosecutor.

We must observe that it has been a rule laid down by this Court in several cases, that as a Court of Revision it will not interfere in any case of acquittal, the law having given to Government the right of appeal in such cases. The object of this reference is to secure the conviction of David more than to have a retrial of Moula Buksh, who has not questioned the propriety of the conviction or sentence passed by the Bench of Magistrates.

We consequently decline to interfere in the case, and we may add that we do not accept the view of the law enunciated by the District Magistrate.

After we had fully considered the case, and had determined the nature of the order which should be passed, we learnt that the Government pleader wished to appear in this case to support the reference made by the District Magistrate, and that David was also represented by an attorney of this Court, but we do not think it necessary to hear any one in this matter.

• • [CRIMINAL JURISDICTION.]

IN THE MATTER OF DOWLAT SING . . . PETITIONER.

1880
Mar. 22nd.*Criminal Procedure Code (Act X. of 1872), sections 227 and 464—Conviction,
Statement of reasons for.*No. 46 of
1880.

Although generally it is not necessary, in cases in which no appeal lies, for a Magistrate to record the reasons for passing his judgment, yet under clause (h) of section 227 of the Code of Criminal Procedure, in case of conviction, he ought to enter in the register, to be kept under that section, a brief statement of the reasons for such conviction; but an omission to do so may, under some circumstances, be remedied at a subsequent time.

CRIMINAL MOTION to set aside a conviction of, and sentence passed against, the petitioner.

The circumstances under which the sentence was passed appear from the judgment of the High Court.

Branson, Baboo Mohesh Chunder Chowdhry, and Mr. H. A. Adkin, appeared for the Petitioner.

The judgment of the Court (1) was as follows:—

The offence imputed to the petitioner in this case is that he, being a person in the employ of some person possessing landed interest in the District of Rajshahye, went upon land belonging to the defendant, and forbade him from cutting the crops then standing on the land, and used some degree of violence towards him, and also used threats.

Now, it appears that there is, or there was, a question between the employer of the accused and the complainant, as to the precise amount of rent which was due from the complainant. It is said that a survey had recently taken place which showed the complainant to be in occupation of more land than he was paying rent for. The complainant, however, was one of several tenants, who, it may be supposed, anticipating a demand of this sort, have

1880

In reDOWLAT
SING.Judgment.

deposited their rent in the Collectorate. Under these circumstances, it is obvious, with reference to section 69 of the Rent Act, that the landlord could not have distrained, and did not, in fact, attempt to distrain for the rent which he at that time claimed to be due, and the view which the Magistrate appears to have taken of the facts is, that the landlord, being unable to resort to distraint, had endeavoured to intimidate the tenant from cutting or carrying away the crops, either until he had paid the amount demanded, or until that question had been somewhat settled. Now, according to section 441 of the Indian Penal Code, a person commits criminal trespass who, having lawfully entered into or upon property in the possession of another, unlawfully remains there with intent thereby to intimidate, insult, or annoy the person in possession of that property, and it appears to us that the petitioner might well be convicted of the offence of criminal trespass, for although he had lawfully gone upon the property of another person with the intention of stating a demand, though without the intention of resorting to the usual and proper form, he unlawfully remained there with intent to intimidate the tenant in furtherance of his claim for rent. It is clear, therefore, that the question whether the petitioner had committed an offence or not, depends entirely on the turn which the evidence took, and upon the Magistrate's view of the credibility of that evidence. The Magistrate appears to have taken considerable pains in this case, heard the evidence at some length, and thought that the offence amounted to one of criminal trespass; so that as regards the merits of the case it appears to us that there is no ground for interference with the conviction.

Then it is said that the conviction has been arrived at in this case without setting forth a brief statement of the reasons therefor as provided by clause (h), section 227 of the Code of Criminal Procedure, and that the Court ought not to allow such an omission to be remedied by a subsequent statement of the reasons. It appears to us that we ought not to lay down, as a rule, that, in no circumstances, ought a Magistrate to be allowed to supply the omission which he had made under this section of the Code, and in the present instance there appears to be good reason for the omission, that is to say, the Magistrate was not

aware that it was necessary, nor had he been accustomed, to record such reasons. It appears to us that he is in error as to the construction which he puts upon that clause. There is at first sight an inconsistency between clause (h) and the previous part of section 227, which says that "the Magistrate need not record the reasons for passing the judgment, nor draw up a formal charge," whereas clause (h) requires him "to enter, in a register to be kept for the purpose, the finding, and, in the case of a conviction, a brief statement of the reasons therefor." The meaning of this is, we think, clear enough. Generally speaking, by section 464 of the Code of Criminal Procedure, the judgment which the Magistrate records must contain the finding and the reasons for the finding, whatever the nature of that finding may be. The first part of section 227 discharges a Magistrate, in the case of a summary trial, from the necessity of recording the reasons for his finding in general, but clause (h) requires him to enter a brief statement of those reasons in the case of a conviction. We have no doubt that the Deputy Magistrate has fully complied with the requirements of the law, and for the reasons stated, we do not think it necessary to make any order in this case. If any sentence beyond that of fine had been passed, we might probably have thought it right, in the circumstances of the case, to mitigate that sentence. As it is, the fine of course has been paid by the employer, and we see no reason to interfere.

1880

*In re*DOWLAT
SING.*Judgment.*

[CRIMINAL JURISDICTION.]

1880
April 7th.
No. 422 of
1880.

DULA FAQUEER

AND

BHAGIRAT SIRCÂR AND OTHERS . . .

Criminal Procedure Code (Act X. of 1872), section 46.

It is not competent for a Magistrate, to whom a case has been referred under section 46 of the Code of Criminal Procedure, to return the case to the referring Magistrate on the ground that, in his opinion, the latter has power to pass an adequate sentence.

All orders passed after a case has been so returned are illegal.

CRIMINAL REFERENCE under section 296 of Act X. of 1872, submitted by the Magistrate of Mymensing.

The circumstances under which the reference was made were as follow :—

One Kahil Shahu Faqueer was the proprietor of a *durga* and some moveable and immoveable property. On his death, his nephew, the complainant Dula Faqueer, succeeded to his property, both moveable and immoveable. The accused set up a false claim to that property, but as the complainant did not yield, they forcibly entered the *durga* on the night of the 27th September, and maltreated the complainant.

The Deputy Magistrate of Kishoregunge, who had only second-class powers, tried the case, and convicted the accused under sections 452 and 147 of the Indian Penal Code. He then referred the case to the Magistrate under section 4 of the Criminal Procedure Code, as he considered that the sentence which should be passed on the prisoners ought to be one of a severer nature than any he was competent to pass on them. After going through the record of the case, and hearing the pleader on the part of the accused, the Magistrate did not consider that the case was one calling for a sentence severer than that which the Deputy Magistrate was himself competent to pass. He, therefore, returned that case to the Deputy Magistrate for him to pass sentence.

After the record was so returned to him the Deputy Magistrate acquitted one of the accused, Bhagirat Sircar, whom he had previously convicted. The Magistrate was of opinion that the Deputy Magistrate, having once convicted Bhagirat Sircar, was bound to pass some sentence on him, especially as no fresh evidence appeared to have been taken. He, therefore, referred the matter to the High Court.

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FAQUEER
v.
BHAGIRAT
SIRCAR.
Judgment.

The judgment of the High Court (1) on the Reference was as follows:—

PRINSEP, J.:—

PRINSEP, J.

Having received this case under section 46 of the Code of Criminal Procedure, the District Magistrate was competent to "pass such judgment, sentence, or order as he deemed proper and as is according to law." It was not competent to him to return the case to the Subordinate Magistrate; because, in his opinion, that officer could pass an adequate sentence. It is not necessary for us, therefore, to determine whether the Deputy Magistrate, who had originally convicted all the accused, could subsequently acquit one of them. We consider that all the orders passed, after the return of the case by the District Magistrate, are illegal, and set them aside, and we direct that the District Magistrate do recall the case, and pass such sentence or order as he may think right, taking into consideration any imprisonment that may have been undergone by any of the accused.

(1) PRINSEP and TOTTENHAM, JJ.

[ORIGINAL CRIMINAL JURISDICTION]

EMPRESS *vs.* BLECHYNDEN.

Evidence Act (1. of 1872), section 32—Statements by deceased as to cause of death.

Where the accused was charged with culpable homicide not amounting to murder, the question was, whether the deceased had died from the effects of a beating.

Held that a statement by the deceased, that he had been beaten by the accused, was admissible in evidence under section 32 of the Evidence Act, without proof that, at the time of making the statement, the deceased was conscious of any fatal effect of such beating.

IN this case (which was a trial for culpable homicide not amounting to murder) medical evidence had been given tending to show that the deceased had died from the effects of a blow on the temple, where there was no external mark.

The case for the defence was that the prisoner Blechynden had given the deceased a slap on the Friday before his death, which happened on the following Thursday; but that he had not struck the prisoner on the Tuesday, the day on which, according to the case for the prosecution, the deceased was brutally beaten by the prisoner, and from the effects of which beating it was alleged that he died.

Evidence was now tendered by the prosecution under section 32 of the Evidence Act to show that the deceased had, on the Tuesday and Wednesday before his death, stated that the sahib had beaten him.

Phillips, for the prisoner Blechynden, contended that this evidence ought not to be received at this stage. The question whether the deceased died from the effects of a beating was one of the main points in dispute. The section could hardly have been intended to extend the English rule of evidence so far as to admit evidence of this kind. The English rule required that the statement should be made under the apprehension of impending death. Here the deceased had no apprehension of death, nor did the statement point to the particular blow which was alleged to have been fatal. There were cases in which the death undoubtedly happened in

consequence of an affray, or was caused on the spot. In such cases the only question was, who dealt the fatal blow? And the prisoner's statement, that so and so gave him a certain blow, or gave him a certain beating, from the effects of which he undoubtedly died, might reasonably be admitted, although he might not be conscious of impending death. The English rule would exclude such evidence. The Evidence Act would admit it. But it should not be construed so as to admit a statement which did not point to any particular blow when he was not conscious of any fatal effect from such beating, and when only a *prima-facie* case had been made of death resulting from a beating at all. The strict language of the section did not necessitate or warrant any such extension; and there was nothing in the Act to show that such an extension was intended by the Legislature.

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 v.
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 Judgment.

WILSON, J., overruled the objection.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF DWARKA NATH BANERJEE, PETITIONER.

Feb. 12th.

- *Criminal Procedure Code (Act X. of 1872), section 64—Procedure—Transfer of Case.*

Where it appeared that the only officers in the district of P otherwise competent to hear an appeal from a conviction for theft of property alleged to have belonged to the Road Cess Committee of the district were, by reason of their connection with that Committee, interested in the result of the appeal, the High Court directed that the petition of appeal, together with all papers connected therewith, should be forwarded to the Sessions Judge of the 24-Pergunnahs to be dealt with as an appeal presented in his own Court.

THIS was an application under section 64 of the Code of Criminal Procedure for an order that an appeal about to be presented by the prisoner Dwarka Nath Banerjee to the Magistrate at Purneah might be heard either by the High Court or by the Sessions Judge of the 24-Pergunnahs.

The alleged circumstances under which the application was made were as follow: On the 14th October 1878, Dwarka Nath

[CRIMINAL.]

C. L. R. 60,

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 —
in re
 DWARKA
 NATH
 BANERJEE.
 —
Statement.
 —

Banerjee entered into a contract with Mr. Hopkins, Magistrate of Purneah and Chairman of the Road Cess Committee, to construct two masonry culverts, one at Binodpore and another at Chandwa, on a certain road in Purneah, known as Road No. 12, and for that purpose he made and burnt, at his own expense, two kilns of bricks at Binodpore. On the 17th, April 1879, he received Rs. 135 from the Purneah Road Cess Committee, which was described in the bill for the money as paid on account of certain materials supplied by Dwarka Nath Banerjee, *viz.*, 18,000 bricks.

In December last, Dwarka Nath Banerjee caused the removal of some bricks belonging, as he thought, to himself, which he had deposited by the side of the road at Chandwa. These bricks were the remainder of the bricks made and burnt by him. The District Engineer of the Purneah Road Cess Committee thereupon wrote a letter to the Magistrate of Purneah on the 20th December last complaining of the removal of these bricks, which, he alleged, belonged to the Road Cess Committee.

Subsequently a formal charge of theft of 1,000 bricks was preferred by the District Engineer against Dwarka Nath Banerjee, and he was first put upon his trial before Mr. Pratt, the Joint-Magistrate of Purneah. Mr. Pratt proceeded to try the case summarily, but, in the course of the trial, an objection was taken on the ground, amongst others, that Mr. Pratt, as Vice-Chairman of the Road Cess Committee, was not a proper person to conduct the trial.

In consequence of this objection, the case was made over for trial to Mr. R. Perry, a Deputy Magistrate of the 2nd class, who, on the 3rd instant, convicted the prisoner of the charge of stealing 1,000 bricks, and sentenced him to two months' rigorous imprisonment and a fine of Rs. 50, and, in default, to a further term of 15 days' rigorous imprisonment.

The petition, upon which this application was made, alleged that the petitioner was anxious to prefer an appeal, and would have already appealed to the Magistrate of Purneah, but that he was apprehensive that his appeal may be summarily rejected before he had time to move the High Court for its transfer to itself or to any other Court. It then proceeded to allege that corre-

spondence, in which a strong bias was evinced about the case, had passed between Mr. Hopkins, the Magistrate of Purneah, and the prosecutor; that that gentleman was the Chairman of the Road Cess Committee, and therefore interested in the result of the appeal.

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In re
DWARKA
NATH
BANERJEE.
Order.

It further pointed out that the present Sessions Judge of Purneah, Mr. Cowley, was Joint-Magistrate and Vice-Chairman of the Purneah Road Cess Committee, and subordinate to Mr. Hopkins at the time when the price of the bricks alleged to be stolen was said to have been paid, and a document purporting to be signed by Mr. Cowley, as Vice-Chairman of the Road Cess Committee, had been put in by the prosecution as evidence of such payment.

It was submitted that, having regard to the position of these gentlemen, the appeal ought not to be heard at Purneah.

M. Ghose and Baboo *Bhoobun Mohun Dass* appeared for the petitioner.

The following order was made by—

WHITE, J. (MACLEAN, J., concurring):—

Under section 64 of the Code of Criminal Procedure, this Court directs that the Magistrate of Purneah do forward forthwith to the Sessions Judge of the 24-Pergunnahs the appeal of Dwarka Nath Banerjee, when presented, against the conviction and sentence, dated the 3rd instant, together with all the papers connected with the case. The Sessions Judge of the 24-Pergunnahs will deal with it as an appeal presented in his own Court. Let a copy of this order be sent to the Sessions Judge of the 24-Pergunnahs.

[CRIMINAL JURISDICTION.]

Feb. 5th.

No. 843 of
1879.

KRISHNO MONEE

AND

EMPRESS

Confession—Criminal Procedure Code (Act X. of 1872), sections 122 and 346.

A confession made by an accused person before a Magistrate who has jurisdiction to deal with the matter to which it relates, may be made the commencement of a trial or inquiry under Chapter XV. of the Criminal Procedure Code, and be treated as a confession under section 346, whether or not the case be still under the investigation of the police.

Per Curiam :—The object of section 122 of the Code of Criminal Procedure is to enable any Magistrate, other than the Magistrate by whom the case is to be tried or inquired into, to record a confession promptly.

Behari Hadji, 5 C. L. R. 238, and *Reg. vs. Shivvi*, I. L. R., 1 Bom. 219, discussed.

APPEAL from a conviction and sentence passed by the Officiating Sessions Judge of Dacca.

The facts are stated in the judgment of the High Court. . .

Baboo *Amerendro Nath Chatterjee*, for the Appellant.

The judgment of the High Court (1) was as follows:—

The prisoner Krishno Monee has been convicted by the unanimous verdict of a Jury of having murdered her husband Huri Charan Kepali, and has been sentenced to death by the Sessions Judge of Dacca.

The evidence against her consists of the depositions of Guru Dass Kepali and Chundra Mohun Kepali, and her confession made before the Deputy Magistrate of Munshigunge.

It appears that Huri Charan Kepali died on a Saturday in the

house of one Guru Dass Kepali. He had been removed there on the previous Tuesday in consequence of his having been seized with purging and vomiting, which he attributed to some poison, mixed in the food, given to him by his wife on the previous day. There can be no doubt that the woman Krishno Monee carried on an intrigue with Lukhi Kant Kepali, and the sickness and death of Huri Charan are attributed to her, acting at the instigation of Lukhi Kant.

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 Judgment.

We have no medical evidence on the record except the report of the Chemical Examiner, who has stated that he could find no traces of any poison in the stomach sent to him.

Guru Dass Kepali deposes that Huri Charan was suddenly attacked with purging and vomiting; that he complained of burning in his stomach; and stated that he attributed this to "panta bāt" given to him by his wife, the prisoner, the previous day, as at the time of eating he noticed the food to be very bitter. His wife, the prisoner Krishna Monee, who was present when he said this, observed: "If you say anything about me, it will not be well for you. I did not give you anything to eat, why do you say that I did?" She went to Guru Dass' house when her husband was taken there, but she disappeared on the following day, and could not be found again until after his death.

Chundra Mohun, the other witness, similarly deposes to the illness of Huri Charan, and he states that the prisoner was fanning the deceased, and when asked, denied having poisoned her husband. So far as this evidence goes we have only the fact that Huri Charan exhibited symptoms which are similar to those caused by poison; that he died four days after taking the food; that he attributed his illness to the "panta bāt" given to him by his wife; and that the intrigue between her and Lukhi Kant affords a probable motive for the crime. We have, however, in addition to this, a full and circumstantial confession made by the prisoner to the Deputy Magistrate of Munshigunge, who committed her for trial by the Sessions Court, and this statement, which has been believed by the Jury, if it be received in evidence, amply corroborates the other evidence, and leaves no doubt that she did administer some poisonous vegetable substance to her husband.

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Judgment.

But it is contended by the pleader that this statement cannot be received in evidence, because the Magistrate recorded it under section 122, and failed to comply with all the requirements of the law in having omitted to cause her to affix her mark or signature to it. In support of this the pleader relies on the well known case of *Reg. vs. Bai Ratan*, reported in 10 Bombay 166.

It is argued that so long as a case is under police-investigation, any confession made to a Magistrate is recorded by him, under section 122, Code of Criminal Procedure, and that is not until the investigation has been completed, and the trial or inquiry under Chapter XV. has commenced, that the statement of a prisoner can be taken under section 346. We are not prepared to agree in this view of the law, or to hold that the submission of the final report by the investigating police-officer has such an effect on a Magistrate's proceedings as to limit his ordinary jurisdiction. Section 122 enables any Magistrate to take a confession, but if that confession be made before a Magistrate who had jurisdiction to deal with the matter to which it relates, in the form either of a trial or of an inquiry under Chapter XV., he can, in our opinion, make that confession the commencement of such trial or inquiry, and so proceed under section 346. Section 342 allows a Criminal Court, in all inquiries and trials, to examine an accused person at any stage of the proceedings.

The Deputy Magistrate, who recorded the statement of the prisoner, was an officer in charge of a Division of the District. He was, therefore, clearly an officer who had full jurisdiction to deal with this case either under section 141 on a police-report, if such report was made, and without any reference from another Magistrate, or of his own motion, under section 142, if he suspected that an offence had been committed.

The cases to which our attention has been directed do not appear to be at variance with this view of the law. In the case of *Reg. vs. Bai Ratan*, 10 Bombay 166 (see page 174), the learned Chief Justice who delivered the judgment of the Court particularly notices that the confession had been recorded by a Magistrate who had "not original jurisdiction either to commit or try the case, and who had not been deputed under section 115 by a Magistrate having jurisdiction to hold a preliminary inquiry

or otherwise to dispose of it. • Accordingly the Second-class Magistrate only recorded the confession, the matter having been brought before him previously to the inquiry held by the committing Magistrate; and, in the following page (175), his Lordship remarks that section 346, taken *per se*, would appear to apply only to examination of the accused, taken on inquiries (as distinguished from investigations) and trials.” •

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T.
EMPRESS.
Judgment:

In the case of the *Empress vs. Munnoo Panioli*, 4 Calcutta Law Reports 137, (S. C.) I. L. R., 4 Cal. 636, it was held that the statement of the prisoner was recorded under section 122, because the Magistrate who recorded it was at the time beyond the local limits of his jurisdiction. It is true that afterwards he conducted the preliminary inquiry within those limits, and committed the prisoner for trial before the Court of Session; but the Court considered that this circumstance did not alter the character of his previous proceeding which was taken by him when he was not in the exercise of his powers as a District Magistrate. This, speaking for myself, was the ground upon which my judgment in the case mainly proceeded.

The learned Judges who decided the case of *Behari Hadji*, 5 C. L. R. 238, not only agreed entirely in the judgment of this Court in *Empress vs. Munnoo Panioli*, but were of opinion that section 122 applies to a confession made to a Magistrate other than the Magistrate by whom the case has to be inquired into or tried out, who may not even have jurisdiction to inquire into or try it. They add, no doubt, the words “and to a confession made while the case is still under investigation by the police, or before such investigation has commenced;” but we do not understand these words to refer to a confession made before a Magistrate who has jurisdiction, and who makes the inquiry into the case under Chapter XV. This appears more clearly from another passage, a little further on, in their judgment, in which they say: “It is not the common case of the prisoner confessing to the police in the course of their investigation, and being sent in at once to the nearest Magistrate for the purpose of having the confession recorded before he may have changed his mind regarding it.”

There is, however, one case, that of *Reg. vs. Shriya*, I. L. R.,

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 MONEE
 v.
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 Judgment.

1 Bombay 219, which seems to support the argument of the appellant's pleader. In it the confession was recorded by a Third-class Magistrate who afterwards committed the accused for trial by the Sessions Court. It seems, however, to have been admitted that he had recorded the confession of the prisoner under section 122. But it is not stated in the report of the case whether the Magistrate had power to hold the inquiry under Chapter XV. without an order of reference from a superior Magistrate under section 44. The absence of full power to act as a Court of Original Jurisdiction may have prevented any proceedings save under section 122. We cannot, therefore, accept this case as an authority in conflict with the opinion which we have expressed.

Police-officers are required by law to send in an accused person not later than twenty-four hours after his arrest. It constantly happens that in nearly all serious cases it requires protracted investigation. The police-officer is unable to send in his final reports under section 127, together with the evidence in the case, until some days afterwards. It was, not, we think, the intention of the Legislature that all confessions, recorded before the submission of this report and the commencement of the trial or inquiry by the examination of the witnesses, should necessarily be governed by the provisions of section 122; such a rule would have the effect of limiting the powers which a Magistrate is ordinarily competent to exercise. It appears to us that the object of section 122 was to enable any Magistrate, other than the Magistrate by whom the case is inquired into or tried, and who is conveniently near at hand, to record a confession promptly. We hold, therefore, that this confession was not recorded under section 122, but under section 346, and we have no doubt that the omission of the attestation by her mark of the prisoner Krishno Monee on the record of her confession was not an error which has in any degree prejudiced her. Her statement, therefore, is receivable as legal evidence.

In this statement Krishno Monee describes how she gave her husband some vegetable substance, and how his sickness followed immediately; and she admits that, in giving the drugs, she intended to cause his death.

Having regard, however, to the interval between the taking of the drug and the death of Huri Charan, and to the absence of all medical evidence, we think that a reasonable doubt may exist as to whether the death of Huri Charan is solely attributable to the act of the prisoner. In our opinion, however, it is abundantly clear that she is guilty of the offence of attempt to commit the murder of her husband. Accordingly we set aside the conviction under section 302, Indian Penal Code, and sentence of death, and in lieu thereof convict the prisoner Krishno Monee under section 307 of the Indian Penal Code, and sentence her to ten years' imprisonment in transportation.

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 KRISHNO
 MONEE
 v.
 EMPRESS.
 Judgment.

[CRIMINAL APPELLATE JURISDICTION.]

1880
May 20th.No. 1 of
1880.

EMPRESS APPELLANT ;

AND

MAHUDDI AND ANOTHER RESPONDENTS.

Criminal Procedure Code (Act X. of 1872), section 457—Penal Code (Act XLV. of 1860), sections 149 and 325—Charge, Alternate or separate—Fury, Verdict of—Sentence on appeal from acquittal, Commencement of—Acquittal, Reversal of sentence of.

Under section 457 of the Code of Criminal Procedure (Act X. of 1872), it is competent to a Jury to return a verdict of guilty of an offence under section 325 only of the Penal Code, although that offence did not form the subject of a separate charge, but was entered as a charge coupled with an offence under section 149 of the Penal Code.

Where the Jury is unanimous, their verdict must be received unless it be contrary to law ; the Court is not competent in such a case to direct it to reconsider its verdict.

Where, on the appeal of Government, an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to jail, and not from the date of their arrest or of the sentence on the appeal.

THIS was an appeal by the Government from an acquittal in trial before the Sessions Judge of Dacca sitting with a Jury.

The circumstances appear from the decision of the High Court.

The *Deputy Legal Remembrancer* appeared for the Government
Baboo *Nund Dulall Pyne*, for the Accused.

The judgment of the High Court (1) was delivered by—

PRINSEP, J. PRINSEP, J. :—

Mahuddi and Panchoo, together with others, were charged under section 149 of the Indian Penal Code, read alternately with sections 302, 304, and 325 of the Penal Code, that is, with being members of an unlawful assembly at a time when (1)

(1) MORRIS and PRINSEP, JJ.

murder, or (2) culpable homicide not amounting to murder, or (3) grievous hurt was caused by some member of that assembly in prosecution of its common object.

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 Judgment.
 PRINSEP, J.

The Jury absolutely acquitted all, except Mahuddi and Panchoo, but with regard to these two men the Jury unanimously found that they were guilty only under section 325, Penal Code, *i.e.*, of having voluntarily caused grievous hurt without grave or sudden provocation. What then followed is thus recorded by the Sessions Judge: "The Court informed the Jury that there was no charge under this section, and requested the Jury to reconsider their verdict. The Jury accordingly retired for that purpose. They returned to Court at 12 minutes to 4 o'clock P. M. The foreman stated they were not unanimous in their verdict against the prisoners. The Court requested them to retire again, and consider their verdict. The Jury returned at 5 minutes to 4, and the foreman stated that the Jury, by a majority (the numbers being 3 to 2), found all the accused not guilty of all the charges."

With regard to the verdict against Mahuddi and Panchoo the Sessions Judge has further recorded his own opinion that he could not accept that verdict, because "(1) there was no charge against them under this section (325); and (2) in his opinion there was no evidence under section 325 against them."

An appeal has been made by Government against the acquittal of Mahuddi and Panchoo, on the ground that the Sessions Judge was bound to accept the unanimous verdict of the Jury, finding these prisoners guilty under section 325 of the Penal Code; that he was not competent to direct them to reconsider their verdict; that that verdict was a good verdict, although the offence punishable under section 325, Penal Code, did not form the subject of a separate charge; and that there was evidence on which the Jury might have convicted the prisoners under section 325 of the Indian Penal Code.

After hearing the Deputy Legal Remembrancer for Government, and the pleader of the prisoners, as well as Mr. C. H. Reily, as *amicus Curiae*, we are of opinion that on all these grounds the Sessions Judge has committed an error of law, and that the unanimous verdict of the Jury, convicting Mahuddi and Panchoo

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EMPRESS

v.

MAHUDDI.

Judgment.

PRINSEP, J.

under section 325 of the Penal Code, should have been received. .

In our opinion, under the terms of section 457 of the Code of Criminal Procedure, it was competent to the Jury to return the verdict of guilty only under section 325 of the Penal Code, although that offence did not form the subject of a separate charge, but was entered in a charge, coupled with section 149 of the Penal Code. Section 457 of the Code of Criminal Procedure enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. Thus, in the present case, the prisoners were not charged themselves with having caused the grievous hurt, but were charged with being members of an unlawful assembly, some of the members of which, in prosecution of its common object, caused that grievous hurt. The verdict of the Jury was, as we understand it, that there was no assembly, but that the grievous hurt was nevertheless caused by these two prisoners. Section 263 requires that "the Jury shall return a verdict on all the charges on which the accused is tried." The requirements of the law are satisfied if, in returning their verdict, a Jury, acting under section 457, returns a verdict of conviction of a minor offence forming part of one of the charges. The verdict which the Sessions Judge refused to take was, in our opinion, a good and legal verdict.

Section 263 declares under what circumstances a Sessions Judge may "require a Jury to retire for further consideration," that is to say, when "the Jury are not unanimous." If the Jury are unanimous, the verdict must be received, unless it is contrary to law. If the Sessions Judge disagrees with an unanimous verdict, which is not contrary to law, he should proceed as laid down in clause IV., section 263. In the case now before us there is nothing in the verdict convicting the prisoners under section 325, Penal Code, which is contrary to law. But, as Mr. Reilly very properly brings to our notice, the Sessions Judge might have said to the Jury that, if they were of opinion that these prisoners could be convicted only under section 325 of the Penal Code, they must return a verdict of acquittal, because there was no legal evidence to sustain such a verdict.

That was not the manner in which the Sessions Judge treated this case, as is shown from the extract from the record which has been quoted; but, even under such circumstances, the Sessions Judge would have acted contrary to law, and afforded just grounds for this appeal, because there is legal evidence which, if believed, would have been sufficient to sustain the verdict. We refer more particularly to the statements which are declared by witnesses to have been made by the wounded man that his injuries were caused by these two prisoners. These injuries have caused his death, and, therefore, his statements were legal evidence under section 32 of the Evidence Act, on which the Jury might form their verdict.

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 v.
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 Judgment.
 PRINSEP, J.

For these reasons we direct that the verdict of the Jury, acquitting Mahuddi and Panchoo, be set aside; that in its place the unanimous verdict of the Jury, convicting Mahuddi and Panchoo under section 325 of the Penal Code, be entered on the record; and we do, accordingly, sentence Mahuddi and Panchoo to seven years in transportation.

The Sessions Judge will issue the usual warrants.

NOTE.—The Sessions Judge subsequently inquired whether these sentences were to have effect from the date of the order of High Court, or of the arrest of the accused, or of their committal to jail, and received the following reply:—

The sentences commence from the date of the warrants committing the prisoners to jail. The Sessions Judge should not issue these warrants until he has possession of the prisoners after their arrest. The order of the High Court was one of imprisonment in transportation for a certain term, which will not commence until the prisoners have been committed to jail.—ED.

[CRIMINAL JURISDICTION.]

1880
May 13th.
Nos. 718 and
719 of 1879.

NISAI MESTRI AND ANOTHER APPELLANTS ;
AND
EMPRESS RESPONDENT.
RAM SOONDUR MONDAL AND ANOTHER APPELLANTS ;
AND
EMPRESS RESPONDENT.

*Confession—Criminal Procedure Code (Act X. of 1872), sections 122 and 346—
Certificate required by section 34 of Criminal Procedure Code—Evidence as to
confession under section 346 of Criminal Procedure Code.*

A certificate which contained the words "taken by me," but in which the Magistrate omitted to record that the prisoners' statement was taken in his hearing, was treated to be substantially a compliance with section 346.

Per Curiam :—Evidence taken under the last clause of section 346 ought to be by the committing Magistrate.

Where a confession is taken under section 122 of the Code of Criminal Procedure, the omission to record the certificate, required by section 346, cannot be remedied by taking evidence under the last clause of the latter section.

CRIMINAL APPEALS.

In these two appeals the question as to the admissibility of certain confessions had to be determined. The circumstances under which they were brought so far as is necessary, this should be stated for the purposes of this report, appear from the judgment of the Court. The cases were originally heard on the 24th March, but were adjourned in order that the decision of the Full Bench on the question of the admissibility of certain confessions which was then under consideration in the case of *Empress vs. Anauthram Singh*, reported *ante*, p. 297, might be known.

The facts appear from the final judgments of the High Court (1), which were as follow :—

No. 718.—We have now considered the cases of the prisoners

Nisai Mestri and Ram Chandra Halder, with reference to the ruling of the Full Bench in the case of Anauthram Singh and others, referred to in our judgment of 24th March, and are of opinion that the ruling in question has no application in the present case, but that the confessions are inadmissible for the following reasons : They were, in our opinion, confessions recorded under section 122 of the Code, and are defective from the omission of the Deputy Magistrate to record the certificate required by section 346, Criminal Procedure Code, and the defect cannot be cured by taking evidence under the last clause of section 346.

Independently of this objection, we think that, even if the defect could have been cured by taking evidence under that section, the Sessions Judge had no evidence on the point before him on which he could act ; for the last clause of section 346 directs that the Court of Session shall take the evidence. In this case the committing Magistrate took the deposition of the recording Magistrate, which he appears to have had no authority to do. Furthermore, we think that, if the committing Magistrate had power to take the recording Magistrate's evidence, the Sessions Judge has not shown that that Magistrate's deposition was properly admitted under the provisions of the 33rd section of the Evidence Act of 1872. There is nothing on the record to show that the presence of the recording Magistrate could not have been obtained without an amount of delay or expense which, in the opinion of the Court, was unreasonable.

We accordingly set aside the conviction and sentence, and direct the discharge of the appellants Nisai Mestri and Ram Chandra Halder.

No. 719.—Having considered the ruling of the Full Bench in the recent case decreed by them, of *Anauthram Singh* and others, we are of opinion that it has no application in the present case.

As regards the prisoner Ram Soondur Mondal, we consider that his confession is inadmissible for reasons which we have recorded in our judgment of this date in the case of Nisai Mestri and Ram Chandra Halder (No. 718), and accordingly set aside the conviction of Ram Soondur Mondal, and direct that he be discharged from prison.

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NISAI
MESTRI
v.
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Judgment

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NISAI
MESTRIv.
EMPRESS.Judgment.
—

With respect to Nisai Haldar, we consider that his confession is admissible, as, in recording it, the provisions of section 123 and section 346 have been duly observed by the recording Magistrate, with the exception that the certificate contains an omission of the words that the prisoner's statement was made "in his hearing." Having regard, however, to the fact that the certificate has the words "taken by me," we think that the certificate may be treated as substantially complying with the requirements of section 546. We, therefore, affirm the conviction and sentence of Nisai Haldar.

[CRIMINAL REFERENCE.]

IN THE MATTER OF EMPRESS

1880
May 3rd.

AND

BUTTO KRISTO DASS AND ANOTHER

Presidency Magistrates Act (IV. of 1877), section 129—Prosecution of criminal case, Right to conduct.

No person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case, under the Presidency Magistrates Act, without the sanction of the Presidency Magistrate.

THIS was a Reference under section 240 of the Presidency Magistrates Act (IV. of 1877) for the opinion of the High Court upon the following question:—

Under section 129, Presidency Magistrates Act, are Counsel or Attorneys entitled as of right to prosecute cases in the Presidency Magistrates' Courts, or must they obtain the sanction of the Magistrates to do so?

The opinion of the High Court (1) was expressed in the following judgment:—

In our opinion, under section 129 of the Presidency Magistrates Act, with the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government on that behalf, no person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

(1) MORRIS and PRINSEP, JJ.

[CRIMINAL JURISDICTION.]

CHUNDER NATH SEN

AND

RAM^a DYAL GHUTTUCK AND OTHERS.

May 28th.

No. 82 of
1880.

*Criminal Procedure Code (Act X. of 1872), sections 521, 523, and 532—Obstruction
to thoroughfare or public place—Fury, Duty of, under section 523 of the
Criminal Procedure Code—Furor, Removal of.*

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction under section 521 of the Code of Criminal Procedure, the place obstructed must be a thoroughfare or public place; and where this is disputed by the person on whom notice to remove the obstruction has been served, the decision of the question cannot be referred, under section 523, to a jury.

A Magistrate ought not, at the instance of one party, and behind the back of the other, to cancel the appointment of a juror, even if such juror be his own nominee.

CRIMINAL MOTION to set aside the order of a Magistrate.
 The facts appear from the decision of the High Court.

Baboo *Bhooburn Mohun Das*, for the Petitioner.

Baboo *Sree Nath Banerjee* and Baboo *Hurry Mohun Chucker-*
butty, contra.

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 CHUNDER
 NATH SEN
 v.
 RAM DYAL
 GHUTTUCKI
 Judgment.

The judgment of the High Court (1) was as follows :—

This matter has arisen from a complaint made on 15th February 1879, regarding an obstruction to a public thoroughfare.

It appears that a few months before this complaint was made, proceedings had been taken under section 521 of the Code of Criminal Procedure, regarding an obstruction to another portion of the same road, and the matter had been referred to a jury under section 523. The report of the jury was not unanimous, but the Magistrate, on 6th May 1879, accepted the opinion of the majority, declaring the road was private, and not public.

The Magistrate, apparently without the consent of either side, directed the same jury to report on the second matter. Shortly after, one of the contending parties objected to one of the jurymen, who had been appointed by the Magistrate, on the ground that he had decided the matter against him in the first case. Without giving notice to the other party, the Magistrate allowed this objection, and appointed another jurymen in the place of his first nominee. The effect of this was to turn the majority to the other side, and to cause the report to be made in favour of the objector that the road was public, and not private.

We are of opinion that the Magistrate should not, at the instance of one party, and behind the back of the other party, have cancelled the appointment of one of the jurors even though such juror was his own nominee. If the objection taken was good, it was equally applicable to all the jurymen who had previously committed themselves to an opinion in the first case.

It is unnecessary, however, to notice this further, because it is clear to us that the entire proceedings have been taken under a

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GHUTTUCK.

Judgment.

mistaken view of the law regarding the respective functions of a Magistrate and a jury under Chapter XXXIX. of the Code of Criminal Procedure.

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction from a thoroughfare or public place, it must be first found that the place so obstructed is a thoroughfare or public place. If this be disputed by the party on whom the notice to remove the obstruction has been served, the Magistrate should not refer the decision of this matter under section 523 to a jury. The duty of a jury is declared by that section to be to try whether the Magistrate's order to remove the obstruction is *reasonable and proper*, not whether the way or place obstructed is public or private property. Until this matter has been decided by the Magistrate under section 532 of the Code of Criminal Procedure or by a Civil Court, the order under section 521 should not be carried out or referred to a jury, but should be stayed.

If, however, a Magistrate, under a mistaken view of the law, and in spite of the objection raising the question, of the right of way, should appoint a jury, then, as pointed out by Mr. Justice PHEAR, in the case of *In re Roy Omesh Chunder Sen*, 21 W. R., Cr. Rul., 64, the order of the Magistrate to remove the obstruction complained of could not be decided by such jury to be reasonable and proper, because, at the outset of their inquiry, they would be met by the *bond-fide* objection that the road was private, and not public property. In such a case, they could only submit a report to this effect to the Magistrate, it being no part of their duty to determine the rights of parties in property. The Magistrate ought then either to refer the party complaining to the Civil Court, or, in the exercise of his discretion, enquire into the matter as provided by section 532.

We may refer, in support of this view of the law, to the following cases: *In re Becharam Bhattacharjee*, 15 W. R., Cr. Rul., 67, decided by LOCH and ONOOCOOL MUKERJEE, JJ.; *In re Roy Omesh Chunder Sen*, 21 W. R., Cr. Rul., 64; *Pitumbur Jugi vs. Nasaruddy*, 25 W. R., Cr. Rul., 4, decided by GLOVER and R. C. MITTER, JJ., and in some proceedings of the

Madras High Court, pp. 304 and 305, published by Mr. Wies
in his collection of the orders of that Court.

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GHUTTUCK.

We, therefore, set aside the order of the 12th April, and
direct that, if the Magistrate finds it necessary to take further
action, he do proceed in the manner now indicated.

Judgment.

[ORIGINAL CRIMINAL JURISDICTION.]

1880
May 13th.

EMPRESS *vs.* HARAN CHUNDER MITTER, GOPAL CHUNDER MITTER, AND UMBICA CHURN CHUCKER-BUTTY.

Cross-examination—Depositions before the Magistrate—Discrepancies.

In a trial before a Sessions Court, the attention of the Jury may be called to discrepancies between the evidence given by witnesses in such Court and that given before the committing Magistrate without the depositions before the Magistrate being put in.

Hill and Souttar, for the prosecution.

Piffard, for the 1st and 2nd prisoners.

Trevelyan, for the 3rd prisoner.

IN the course of the cross-examination of one of the witnesses for the prosecution, Mr. Trevelyan asked the witness whether he had made certain statements before the Magistrate.

WILSON, J. :—You need not ask that question, as the depositions show what the witness said before the Magistrate.

Trevelyan.—If your Lordship considers that I can comment to the Jury upon differences between the evidence here and that given before the Magistrate, without putting these questions, or without putting in the deposition taken before the Magistrate, I do not wish to press the question.

WILSON, J. :—

You are entitled to draw the attention of the Jury to these differences without putting in the deposition, and I shall point them out to the Jury.

• • [CRIMINAL JURISDICTION.]

IN THE MATTER OF A REFERENCE FROM THE CHIEF PRESIDENCY MAGISTRATE.

1880
June 4th.
—
No. 115 of
1880.

Indian Penal Code (Act XLV. of 1860), sections 213, 214, and 406—Compounding offences.

The offence of criminal breach of trust, under section 406 of the Indian Penal Code, cannot, under the terms of sections 213 and 214 of the same Code, be lawfully compounded.

THIS was a reference under section 240 of the Presidency Magistrates Act, submitted by the Chief Presidency Magistrate for the opinion of the High Court on the following question, *viz.* :—Is the offence of criminal breach of trust, under section 406 of the Indian Penal Code, an offence that can be lawfully compounded?

The opinion of the Court (1) was as follows :—

In our opinion the offence of criminal breach of trust being one into which the element of dishonesty enters, that offence cannot, under the terms of sections 213 and 214 of the Indian Penal Code, be lawfully compounded.

• • (1) JACKSON and TOTTENHAM, JJ.

[CRIMINAL JURISDICTION.]

1880
June 9th.
No. 98 of
1880.

IN THE MATTER OF DWARKA MANJHEE } PETITIONERS.
AND OTHERS }

Conviction for graver offence on appeal—Criminal Procedure Code (Act X. of 1872), section 448—Appeal, Right to withdraw petition of.

It is not competent to an Appellate Court to find a prisoner on appeal guilty of a graver offence than that with which he was charged at his trial, unless an opportunity is afforded to the accused of defending himself against the charge so altered.

In the Matter of *Chunder Nath Deb*, 5 C. L. R. 372, distinguished.

Quære.—Whether a petition of appeal against a conviction can be withdrawn after the Appellate Court has perused the evidence.

THIS was a motion to set aside a conviction and sentence passed by the Sessions Judge of Mymensingh, on the ground that he had no jurisdiction to pass such sentence by reason of the prisoners having by petition withdrawn the appeal which they had presented against the decision of the Deputy Magistrate.

The circumstances are stated in the judgment of the High Court.

Phillips and *Baboo Mohiny Mohun Roy*, for Petitioners.

The judgment of the High Court (1) was as follows:—

The petitioners before us were convicted before the Deputy Magistrate of Mymensingh of the offence of being members of an unlawful assembly, under section 143 of the Indian Penal Code, and were sentenced to six weeks' rigorous imprisonment and a fine of Rs. 20 each, or, in default, to further imprisonment for two weeks each. They appealed to the Sessions Judge. On the day that the appeal was disposed of, their Vakeel stated that they wished to withdraw the appeal. The Sessions Judge notices this in his judgment, and says that on this being

(1) TOTTENHAM and MACLEAN, JJ.

intimated, he said that in that case they must put in a petition to that effect, but that the Court would not thereby feel itself debarred, should it think the sentence passed to be inadequate, from making such enhancement as it might deem necessary; and further on, in making the final order, the Court remarks that the prisoners that day put in a petition for withdrawing the appeal. The Judge, however, considered the Deputy Magistrate to have taken an inadequate view of the case, and considered that the prisoners ought to have been convicted under section 147 instead of section 143. He, therefore, altered the conviction accordingly, and passed a sentence of rigorous imprisonment for two years.

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In re
 DWARKA
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 Judgment.

They here contend through their Counsel that the Judge had no jurisdiction to deal with the appeal, it having been withdrawn; and it has been further contended that, even if the appeal be taken as not withdrawn, the Court, not having allowed its withdrawal, the Judge had no authority to alter the conviction to one of an offence of a graver nature than that with which the prisoners had been charged in the first Court, and that, under any circumstance, the sentence passed in appeal was too severe.

We are not prepared to say in this case that the petition for withdrawing the appeal, presented as it was at the last moment, debarred the Appellate Court, which had perused or had heard the evidence read, from dealing with the appeal on the merits. There is authority—*Chunder Nath Deb, In the Matter of*, 5 C. L. R. 372—for holding that an appeal can be withdrawn at the option of the appellant before the Appellate Court has decided to hear it, but that case does not go so far as the petitioners contend for in the present case. But we think that the Appellate Court was not right in altering the conviction of the petitioners so as to find them guilty of a graver offence than that with which they had been charged on their trial. It is provided in the Code of Criminal Procedure that the Court may alter the main charge; but, where that is done, the accused must be allowed an opportunity of defending against the charge so altered. We are inclined to think with the Sessions Judge that the sentence originally passed by the Deputy Magistrate was inadequate, but we find that, since the order passed in

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In reDWARKA
MANJHAR.Judgment.

appeal, the prisoners have undergone upwards of three months' imprisonment in addition to the term first imposed upon them. They have now in fact been imprisoned for four months and a half, being a period not very far short of the maximum provided for the offence with which they were charged, and we think they have undergone a sufficient punishment. We, therefore, now direct their release,

. . .

[CRIMINAL JURISDICTION.]

EMPRESS

AND

BEHARI LALL BOSE.

June 9th.

No. 80 of
1880.

*Cross-examination by Court—Criminal Procedure Code (Act X. of 1872),
section 250.*

It is improper for the Court to cross-examine a prisoner with the apparent object of convicting him out of his own mouth of false statements, and so making him prejudice himself in respect of the matter with which he is charged.

CRIMINAL REFERENCE submitted to the High Court by the Sessions Judge of Hooghly under section 263 of the Criminal Procedure Code, Act X. of 1872.

The circumstances were as follow :—

The accused in this case, Behari Lall Bose, held a post of Excise Darogah at the Bastarrah Government Distillery in the district of Hooghly.

The rule there observed is, that private distillers may use the Government stills for the manufacture of liquor. No restriction is imposed upon the quantity made, but all liquor once ready is stored in a godown on the premises, and can only be removed therefrom by the maker after proof and the payment of duty.

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SOON.

Statement.

The accused in this case was in charge of, and responsible for the due performance of, his office.

On the 21st of February last, one Sookmoye Saha applied, as alleged by the prosecution, to the accused for three gallons of liquor; this quantity was duly supplied to him by the accused Darogah, but, in making out the pass and its counterfoil, the accused had stated the amount taken out to be only two gallons. Sookmoye, with his earthen pot containing the liquor, was arrested by the police, on the information of the witness Faizulla, about a quarter of a mile from the distillery. It was admitted that the earthen pot was found to contain three gallons, and that the counterfoil in the possession of Sookmoye only showed a pass of two gallons. Sookmoye was thereupon tried summarily on a charge of illegally removing spirits under section 58 of the Bengal Act VII. of 1878.

His defence on that occasion was, that he only applied for and received two gallons of liquor from the Government Distillery, and accounted for the presence of the other gallon in his pot by the story that he purchased the same from one Koonjo Behari Saha, a liquor vendor, whose shop is close to the Government Distillery—this purchase having been made during the time which elapsed between his leaving the distillery and the moment of his arrest. In proof of this statement Sookmoye examined Koonjo Behari Saha, and put in the khatta-book of the latter in proof of such sale. The Court, however, disbelieved this evidence, finding that the page of the khatta-book which purported to show this sale had been obviously tampered with. It thereupon convicted Sookmoye, and sentenced him to a fine of Rs. 100. At the same time the Court directed that the present accused should be prosecuted. After inquiry by the Deputy Magistrate, the case of the present accused was committed, and duly came on for trial before the Sessions Judge at Hooghly. The charge was drawn under section 218 of the Indian Penal Code. The defence made by the accused was, that he had not, on the date above mentioned, given Sookmoye Saha more than two gallons of liquor as mentioned in the pass; that he was ignorant of the manner in which Sookmoye had become possessed of the extra gallon; that the evidence of the two witnesses, Faizulla and

Bamachurn, connecting him with the delivery of this extra gallon, was false, and prompted by feelings of enmity. The jury unanimously acquitted the accused; the learned Judge, however, dissenting from this verdict, referred the case under section 263 of the Criminal Procedure Code to the High Court.

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 BOSH.
 Statement.

Reily (with him Baboo *Troylucko Nauth Mitter*) for the accused: The facts, as made out by the prosecution, even if true, do not disclose an offence which falls under section 218 of the Indian Penal Code.

It is evident, at any rate, that the jury believed the story of the defence, and gave expression of such opinion by their unanimous verdict. The accused in this case has been put to a severe and lengthy cross-examination by the Court. In the course of this cross-examination an attempt seems to have been made to force the accused to associate himself with the defence set up by Sookmoye in the previous case, and which had been found to have been untruthful by the Court which had tried that case. The whole of this cross-examination was illegal and quite beyond the scope of the powers given to the Judge under section 250 of the Code of Criminal Procedure. See *ex-parte Virabudra Gaud*, 1 Madras High Court Reports 199; see also *In re Chinibash Ghose*, 1 Calcutta Reports 436, where a similar action of this very Judge is strongly remarked upon by the High Court.

This Court ought not to interfere with the unanimous verdict of a jury unless such verdict prove to be palpably and perversely wrong, and although section 263 does leave the discretion of the Judges uncontrolled, yet the High Court will not, unless for most imperative reasons, interfere. See a recent case on this subject—*Empress vs. Mukhun Kumar*, 1 Calcutta Reports, p. 275, where the Chief Justice lays particular stress upon the weight to be attached to an unanimous verdict of a Jury. (See also *Empress vs. Mahuddi*, ante, p. 349.—Ed.)

In this case the jury are unanimous, and there is nothing on the record to show that the minds of the jury had been influenced by prejudice, or by any circumstance which may be said to have prevented them from forming a correct judgment.

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v.

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BOAT.

The judgment of the Court (1), which was as follows, was delivered by—

TOTTENHAM, J. :—

Judgment.

TOTTEN-
HAM, J.

The prisoner in this case was tried by the Sessions Judge of Hooghly, charged under section 218 of the Penal Code, that is, that he, being a public servant, framed an incorrect record with intent to cause loss or injury to the public. The facts under which he was charged are as follow: He is an Excise Darogah in charge of a Sudder Distillery in the Hooghly District. It was his duty to superintend the sale of distilled spirit to retail vendors. He had to record the quantity sold to any particular purchaser, and the amount of duty paid, and he had to give a pass for that quantity to the purchaser. It is alleged that, on the 21st February, a person named Sookmoye Saha came to the distillery, and obtained a pass from the prisoner for two gallons of country-spirit, but that, with the prisoner's connivance, he carried off three gallons, the third gallon not being entered in the book or pass. The purchaser having gone a little way from the distillery, he was stopped, and the excess liquor was discovered. The prisoner was, therefore, charged under the section above named for having incorrectly drawn up a pass describing the quantity of liquor taken by Sookmoye. It is suggested that the accused incorrectly framed the pass in order to cause injury to the public revenue. The charge, however, simply says "injury to the public."

The case was tried by jury, and the jury unanimously returned a verdict of acquittal. The Sessions Judge, dissenting from that verdict, has referred the case to this Court under section 263 of the Code of Criminal Procedure. Mr. Reily for the prisoner has contended that the section of the Procedure Code, under which the prisoner has been charged, cannot apply to this case, and he has also contended that, by the universal practice of this Court in dealing with cases referred under section 263, it is settled that the verdict of a jury, if unanimous, should be sustained unless it is shown to be obviously wrong. We may observe that the Government has not thought it necessary

to cause any appearance to be made in support of the Sessions Judge's opinion. Mr. Reily has read to us the whole record. The evidence for the prosecution, so far as it affects the prisoner, consists of the depositions of two chuprasees attached to the Distillery, and the examination of the prisoner himself before the Sessions Court. As to this last, the learned counsel has taken strong objection to the manner of that examination, and we think that he is justified in so taking objection. It seems to us that the Sessions Judge went far beyond what the law contemplates in permitting the Court to examine the prisoner. It is not merely an examination as to points proved in evidence apparently telling against the prisoner, and which he might be able to explain. It is, in reality, a very severe cross-examination which goes into points entirely outside the matter in question, and which tends to involve the prisoner in a line of defence which he did not himself set up, and which was found to be false by another Court when set up by the liquor-vendor, who was prosecuted under the Excise Act for being in possession of liquor uncovered by a pass. This sort of examination, we think, is not fair to an accused person. It is not proper for the Court to cross-examine a prisoner with the apparent object of convicting him, out of his own mouth, of false statements, and so making him prejudice himself in respect of the matter with which he is charged. As to the witnesses for the prosecution directly implicating the prisoner, we may observe that they are also officers of Government, whose duty it was, equally with the accused, to see that no liquor was permitted to be taken out of the distillery except under a proper pass. According to their own account they suspected and even saw that something wrong had been done between the distiller and the purchaser. Instead, however, of intimating their suspicions to the Darogah, whose subordinates they were, they allowed things to go on, and the liquor to be taken out of the premises, and then contrived to have it seized probably with the object of obtaining the Government reward, which, it appears from the record, was actually paid to them. Their own conduct, therefore, was not above suspicion, and it would be very difficult to say that the jury (who unanimously disbelieved them) were obviously or perversely wrong in so disbelieving them. Besides

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—
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this, the accused brought some evidence to show that the two chuprasees in question were on bad terms with him, owing to his having found fault with them in respect of their official conduct. This point again is one on which the jury had a perfect right to form their own opinion. Then, as remarked by the Sessions Judge in his letter of reference, he did not ascertain from the jury upon what particular ground they came to their verdict of acquittal—whether they absolutely disbelieved the evidence of the chuprasees so far as it inculpated the prisoner, or whether the evidence for the defence was, in their opinion, sufficient to refute that evidence. We do not think it necessary to say anything further than that the jury having come to a clear and unanimous finding of acquittal, and there being palpable grounds on which such a verdict was justifiable, we do not feel that we ought to interfere even if our opinion were opposed to that verdict. As to the legal question raised by the learned counsel, as to whether the section applies, it seems unnecessary, in the view we have taken of the case and of our functions, to decide that question. Had there been a conviction, and an appeal from it, it might have been necessary to decide the question of law, but it is more satisfactory to us, and no doubt it is more satisfactory to the prisoner, that the verdict of the jury can be sustained on other grounds. The prisoner must, therefore, be acquitted and released from his bail.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF THE PETITION OF P. QUIRAS AND
F. C. MAUNDERS.

June 15th.

No. 116 of
1880.

*Criminal Procedure Code (Act X. of 1872), sections 72 and 84—European British
subject—Jurisdiction, Waiver of.*

Section 72 must be strictly construed in connection with section 84 of the Code of Criminal Procedure, and before a European British subject can be considered to have waived the privilege conferred upon him by the former section, it must appear that his rights under that section have been distinctly made known to him, and that he has been enabled to exercise his choice and judgment whether he would or would not claim such rights.

In re Foy, 1 Tay. and Bell Rep. 226, and *Reg. vs. Bholanath Sen*, 1. L. R., 2 Cal. 23.

CRIMINAL MOTION to set aside a conviction passed by one of the Magistrates of Raneegeunge.

In this case four employés of the East India Railway Company were tried for, and convicted of, riot in Assensole, and sentenced by the Magistrate, two of them to fines, and two of them to two months' rigorous imprisonment. The Magistrate, in his decision, stated that the defendants were British subjects, but that they had stated that they had no objection to his trying them, and that he accordingly tried them, although he was not a Justice of the Peace, and had only second-class powers.

A Rule was applied for, and obtained on behalf of the present petitioners, who had been sentenced to two months' rigorous imprisonment, calling upon the Magistrate to show cause why the conviction should not be set aside. An order was at the same time made for the records to be sent up to the High Court.

The affidavit, upon which the Rule was granted, stated that the petitioners did not know their privilege as British subjects to be tried by a Magistrate of the first class and a Justice of the Peace,

[CRIMINAL.]

C. L. R. 64.

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Judgment.

On the Rule coming on for hearing,

Piffard and Mr. S. J. *Leslie* appeared for the Petitioners.

Piffard contended that a Second-class Magistrate had no jurisdiction in the case of British subjects, and that, if he had no jurisdiction, the consent of the defendants could not give him jurisdiction—*In re Foy*, 1 Taylor and Bell 226. He further argued that, although section 84 of the Code of Criminal Procedure enacted that, if a British subject did not claim his right, he was to be held to have waived it, yet this would not give jurisdiction to a Magistrate of the second class who, under section 72, had no jurisdiction.

As the Magistrate, he said, did not inform the defendants of their privileges as British subjects, their answer, that they had no objection to being tried by him, could not be regarded as a waiver of their rights.

The judgment of the High Court (1) was as follows:—

JACKSON, J. JACKSON, J. —

We are of opinion that the provisions of section 72 of the Code of Criminal Procedure, relating to the kind of Court which shall have jurisdiction, and shall not have jurisdiction, to inquire into a complaint or try a charge against a European British subject, do in fact constitute a privilege, that is to say, that they are not so much words taking away entirely jurisdiction as words which confer on the British subject a right to be tried by a certain class of Magistrates, and by no others, which right the Code enables him to give up. It appears to us that that is the only view of the section which is compatible with a reasonable construction of section 84. We have had cited to us a case with which we are of course familiar—the case of *In re Foy* (1 Taylor and Bell's Reports, p. 226)—in which judgment was given by Sir L. PEEL; and a more recent case before Mr. Justice MACPHERSON and my brother MORRIS, *Reg. vs. Bholanath Sen*, 1. L. R., 2 Cal. 23. The case of *In re Foy* it appears to me unnecessary to mention here at present, because the

(1) JACKSON and TOTTENHAM, JJ.

state of the law, and the state of the jurisdiction under which that case was decided, was altogether different and has in fact passed away. In regard to the judgment delivered by Mr. Justice MACPHERSON, I entirely concur in it, and for this reason that there is nothing in the Code of Criminal Procedure, and I apprehend there never could be any provision, which would enable an accused person to waive an objection to jurisdiction which was not personal to himself, that is to say, no person could by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstances not personal to the accused. That was the case in the matter before Mr. Justice MACPHERSON. There it was alleged that, of the three Magistrates who constituted the Bench, one, the presiding Magistrate, was the virtual prosecutor, and another had himself a personal and pecuniary interest in the case, and therefore no consent of the prisoner could get over these disqualifications. As to section 84 the language is peculiar. It does not declare that a European British subject may waive his privilege, but it provides that, if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject. Mr. Piffard suggested to us that the meaning of the words "waive his privilege" in that section is, that the accused, while retaining all his right, as to want of jurisdiction which section 72 confers, so that he could not be tried except by a particular Court or Magistrate, might yet deprive himself of the right to bring an action for damages. It appears to us that that is not a reasonable construction. We do not think that the Legislature could have meant that a person might be tried or committed by a Magistrate whose act, in so trying or committing him, would be altogether invalid, so that such act could be immediately got rid of by application to the proper Court, but that the accused by waiver should protect the Magistrate so that no action would afterwards lie for damages. It appears to us that the waiver of the privilege spoken of must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has, and the words, "dealt with before the Magistrate," mean

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everything contained in this chapter, that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which he would be liable.

But then we are also of opinion that section 84 must be construed strictly with section 72, and that we must read them as if they were connected together by the word "but," that is to say, "no Magistrate shall have jurisdiction to inquire into a complaint or try a charge against a European British subject, unless he is a Magistrate of the first class, *but* if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege;" and clearly we think that, before a European British subject can be considered to have waived the privilege conferred upon him by section 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights. Now, in the case before us, for anything that appears to the contrary, the question put to the accused may simply have been whether they had any personal objection to Mr. Casperz as Magistrate to try them. The answer naturally would be, "we have no objection to be tried by Mr. Casperz." But, if the question had been "You stand here, as European British subjects which I know you to be, and as such British subjects you have the right to claim that you should not be tried except by Magistrates of a certain class to which class I do not belong. Do you claim that right or not?" The answer might have been quite different, and it would be entirely for them to choose whether they would avail themselves of that privilege or not. It does not appear that any such question was put to them in the present case, and therefore we think the proceedings before the Deputy Magistrate were bad, and the conviction must be quashed.

Application had been made by Mr. Piffard that this judgment might apply to the case of two other prisoners who have been also convicted, but who are not petitioners before us. We think that Mr. Casperz should be called to state whether, in point of fact, the provisions of the Code of Criminal Procedure were made known to those two prisoners.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF HOSSEIN BUKAS SHEIKH } APPELLANTS;
AND OTHERS, }

AND OF

SHAKIR SHEIKH AND OTHERS APPELLANTS.

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June 24th.

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Criminal Procedure Code (Act X. of 1872), sections 250, 265—Riot, Trial of members of opposing factions for—Procedure in trials of members of opposing factions in riots—Consent of pleaders to irregularity in trial—Irrregularity—Examination of accused by Court.

The members of two opposing factions in a riot were committed for trial to the Sessions Court on two distinct and separate committals. The Judge, who sat with a Jury, having taken the evidence of the witnesses for the prosecution in one case, upon his own suggestion, but with the consent of the pleaders for the accused, postponed the taking of the evidence for the defence in that case, and immediately proceeded before the same Jury to take the evidence for the prosecution in the counter-case. This having been done, the Court examined the witnesses for the defence in the first case, and then in the second case. The pleaders for the defence in both cases having addressed the Court, and the Government Pleader having been heard in reply, the Judge summed up the facts in both cases to the Jury, who returned a verdict of guilty in respect of all the accused.

Held that the procedure resorted to by the Judge was a violation of the salutary rule, that in such cases the trials should be kept entirely distinct; and that the accused having been materially prejudiced by the mode of trial adopted, the trials should be set aside.

Held, also, that the consent given by the pleaders for the defence could in no way cure the defect in the arrangement suggested by the Judge.

The power allowed by section 250 of the Code of Criminal Procedure authorizing the examination by the Court of an accused does not contemplate his being subjected to cross-examination; and the Judge cannot be allowed, by the method of examination adopted by him, to endeavour to force an accused person to criminate himself.

The object of the power entrusted to the Court by the section quoted is to enable the Court, from time to time, to give the accused (especially if undefended) an opportunity to explain, if he desire to do so, any facts which have been spoken to by the witnesses for the prosecution; or, at the close of the case, to obtain from the

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accused what explanation he may desire to offer regarding facts which, in the opinion of the Court, implicate the accused with the offence of which he stands charged.

Reg. vs. Sheik Busu, 8 W. R. (F.B.) 47, distinguished. *Reg. vs. Bholanath Sein*, 25 W. R. 57; and *In re Chinibash Ghose*, 1 C. L. R. 436, followed.

APPEALS from convictions and sentences passed by the Sessions Judge of Hooghly.

Baboo *Gopee Nath Mookerjee* and Mr. *M. L. Sandel*, for the Appellants.

The Deputy Legal Remembrancer, for the Crown.

The facts of the case are sufficiently set forth in the judgment of the High Court (1), which was delivered by—

PRINSEP, J. PRINSEP, J. :—

In an attempt made by certain villagers of Juggunnathpore to remove an obstruction to the flow of water erected by the villagers of Sikandarpore, a riot took place, in which Sharintoolla, one of the Juggunnathpore people, was killed.

In accordance with the procedure which has been prescribed in such cases by numerous rulings of this Court, the Magistrate held separate proceedings against each party, keeping the evidence against them separate, and he committed the contending villagers for trial by the Court of Session in separate cases.

The case against the Sikandarpore villagers first came on for trial. After the close of the evidence for the prosecution (so the Sessions Judge records), "by arrangement with the pleaders, the case for the defence in the present trial was postponed till after the conclusion of the case for the prosecution in the counter trial," *i. e.*, the case against the Juggunnathpore villagers. The trial of the case last mentioned then commenced. "The Judge required the same Jury as were then sitting on the counter case" (*i. e.*, the case against the Sikandarpore villagers) "to sit on the present trial. The pleaders for the prosecution and for the defence in both cases had suggested this course." After the close of the evidence for the prosecution in this case, the Sessions

Judge returned to the first case and took the evidence for the defence. He then took the evidence for the defence in the second case. The pleaders for the defence addressed the Court in both cases. The Government pleader for the prosecution in both cases replied. The Sessions Judge delivered a written summing up in both cases simultaneously, and then received and recorded the verdict of the Jury, convicting all the prisoners in both cases. The prisoners were accordingly sentenced, and they have now appealed to this Court.

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The objection taken in both appeals is the same, that the prisoners have been prejudiced by the manner in which the two cases have been virtually tried together. Before dealing with this objection we feel bound to say that the mode of trial adopted by the Sessions Judge is quite opposed to that which, for many years past, has been pursued in cases where the members of opposing factions are charged with rioting. The very salutary rule which requires that in such cases each party should be tried separately has here been practically violated by the procedure adopted by the Sessions Judge. It is true that the Sessions Judge has so far complied with this rule as to take evidence and record the defences of the accused persons in each case; but, looking at the procedure which has been already described, we cannot, in any sense of the term, regard these as two separate trials. They are certainly not distinct from one another, because the two trials were not only held before the same Jury, but they proceeded almost in parallel lines until they united in the addresses of the pleaders engaged, and in the Sessions Judge's summing up. There is no authority of law for such a procedure. But it is suggested that the prisoners cannot plead that they have been prejudiced, because this mode of trial was adopted at the suggestion and with the consent of the pleaders engaged. We cannot, however, accept this suggestion; for, as pointed out by MACPHERSON, J., in the case of *Queen vs. Bholanath Sein*, 25 W. R. 57, when criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused, or (we would add in the present cases) of the pleaders for the accused. The "arrangement," as the

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Sessions Judge terms it, seems to have been adopted for the convenience of the pleaders themselves, and from a narrow, but we think a mistaken, view on their part, that it would benefit their clients. As for the prisoners themselves, we cannot suppose that they had any voice or understanding in the matter.

We will now proceed to consider the effect of the procedure adopted in the several stages of each case as regards the position of the several prisoners.

The law (section 265, Code of Criminal Procedure) declares that the "same Jury may try as many accused persons successively as to the Court seems fit."

By this we understand that one trial is to follow the other, that is, that, on the conclusion of one trial, the same Jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted, piecemeal, in such a manner that at their conclusion the Jury shall be called upon to decide, at one and the same time, upon two distinct classes of evidence, which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding, no Jury ought, we think, to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried, and the evidence bearing upon those issues, should be laid before the Jury, and that the minds of the Jury should not be encumbered by the consideration of foreign and irrelevant matter.

These considerations do not appear to have been present to the minds of the pleaders of the different accused when they consented to the "arrangement" to which the Judge refers. But, as already pointed out, such consent on their part cannot prevent the prisoners showing, on appeal, that they have been materially prejudiced by the course adopted. It is apparent that the prisoners accused in the second case had not the full benefit of section 243, that is, of challenging the Jurors who were to try them. Who can doubt that, if the first case, which was that of the Sikandarpore accused, had been tried out and resulted in an acquittal, the Juggunnathpore accused would have at once challenged all the Jurors on the

ground that they were not likely to address themselves to the case as it affected them with impartial and unbiassed minds? So also the Sikandarpore people might justly complain that, though they had the right of challenge before their own trial commenced, they could have no right to object to the trial by the same Jury of the second case, notwithstanding that they might be seriously prejudiced by evidence given in that case, criminating them behind their backs, and without their having an opportunity of cross-examination. . . .

It has been argued that the Sessions Judge has power under the law to adjourn a trial, and that consequently it was not illegal on his part to commence the second trial before the conclusion of the first. But, according to section 264, the Court can only adjourn the trial if it "considers that such adjournment is proper, and will promote the ends of justice." No reason for the adjournment in turn of each trial has been stated. From the terms of the Sessions Judge's summing up it would seem that the "arrangement" was suggested by himself or by the Government prosecutor, for he states that it was "acquiesced in by the pleaders for the defence in both cases." In our opinion the adjournments were neither "proper" nor likely to "promote the ends of justice." But, even admitting that, under some circumstances, a second case may be tried by the same Jury during the pendency of the first trial, it by no means follows (and this constitutes a very grave objection) that the two cases should be summed up together and decided simultaneously.

The Sessions Judge, in the commencement of his summing up, has himself indicated this objection to the procedure adopted by him. He tells the Jury that "the evidence for the prosecution in one case is practically that for the defence in the other, though a special defence has been made in each case." The Judge, no doubt, felt the difficulty in which the Jury were placed, for he states: "I proceed to sum up the evidence in both cases on this single charge, in which, however, I will do my best to keep each case, and the evidence proper to it, singly before you." We recognize the Sessions Judge's endeavours to do his duty in this respect, but he seems to have lost

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sight of the fact that some of the prisoners in each case were examined as witnesses in the other, and that, under such circumstances, it was impossible to expect that the Jury should be able to separate in their minds what was said by a prisoner as a witness from what he admitted on examination as an accused. A witness, under section 132 of the Evidence Act, cannot excuse himself from answering any relevant question upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate him; but the law also provides that no such answer, which a witness shall be compelled to give, shall be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. It is unnecessary to refer to the particular statements made by seven of the prisoners, three on one side and four on the other, when under examination as witnesses, but several criminating statements have been made by them, especially in cross-examination. The Sessions Judge has made no attempt to exclude these statements, and we think that, in considering the evidence of both these cases together, the Jury could not separate the evidence in each; and even in spite of the strongest precautions, both on their own part and on that of the Judge, must unconsciously have been influenced in the one case by evidence given in the other. There was no such interval between the two trials as would enable them to efface from their minds the effect of the evidence in one case when considering their verdict in the other. So far, therefore, as the prisoners, who were also examined as witnesses in the two cases, are concerned, we are quite clear that this irregularity has prejudiced them most materially in their defence. It is almost impossible to distinguish between the cases of these accused and that of their fellows, though, from the position that the former occupied as witnesses, we have less hesitation in finding that they have been very seriously prejudiced by the mode of trial adopted by the Sessions Judge.

Our attention has been directed to some cases, and particularly to a judgment of a Full Bench, in the case of *Reg. vs. Sheik*

Buzu, 8 W. R. 47, in which it was held that the simultaneous trial of two parties engaged in a riot did not prejudice them so as to necessitate a reversal of their conviction and a re-trial; but we observe that in all these cases the trials were held with the aid of assessors, and not by Jury as in the present case. This difference in the trial is most material as regards the particular effect on the prisoners. The Sessions Judge, with whom the decision in the one form of trial rests, is less likely than a Jury to have been influenced by what he learnt in the other case; and while the verdict of the Jury would be final on the facts, the findings of the Sessions Judge would be open to correction by the High Court on appeal.

On these grounds we consider that the prisoners in these cases should be re-tried before a separate Jury in each case, and we accordingly set aside the convictions and sentences, and direct that the Sessions Judge do so proceed.

We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner, in the manner of the cross-examination of an adverse witness by counsel.

* This Court has already pointed out to the Sessions Judge, on more than one occasion (see particularly the case of *Chintibash Ghose*, 1 C. L. R. 436), that, by exercising the power allowed by section 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain, from time to time, from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or, after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us we observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner in the second case he examined the accused, at considerable length, before the case for the

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prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law.

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We cannot consider that trials so commenced have been fairly conducted. The minds of both the Judge and Jury are, at the outset, prejudiced by irresponsible statements made by the accused while subject to this system of cross-examination before their guilt has been established by the examination of a single witness. We trust that the Sessions Judge will discontinue this practice, which has been repeatedly condemned by this Court, and is, in our opinion, quite opposed to the spirit of our law in India.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF JOYUDEE PARAMANICK } ... APPELLANTS.
AND OTHERS. }

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Criminal Procedure Code (Act X. of 1872), sections 249 and 349—Approver, Evidence of—Approver, Trial of, along with his accomplices—Deposition of approver before Committing Magistrate—Procedure on withdrawal of conditional pardon under section 349 of Criminal Procedure Code.

Per FIELD, J.—There is a grave doubt whether the deposition of an approver taken before the Committing Magistrate, may be used as evidence against his accomplices on their trial before the Sessions Court, the conditional pardon of the approver having been withdrawn.

Where a conditional pardon, granted to an approver, is withdrawn under section 349 of the Criminal Procedure Code by the Sessions Court, the Judge ought to wait till the conclusion of the trial of the accomplices, and then, before passing judgment on them, if found guilty, proceed against the approver.

THIS was an appeal by eleven prisoners, who had been convicted, by the Sessions Judge, of dacoity.

One of the eleven prisoners, Joyudee Paramanick, was allowed by the Magistrate to give Queen's evidence. In his deposition before the Magistrate, he stated that he accompanied the dacoits close up to the place where the dacoity was alleged by the prosecution to have taken place; but he denied having actually participated in the commission of the dacoity, and said that he remained in a bamboo clump keeping the clothes of the dacoits whilst they were plundering the house. He further stated that certain *tabeeses* had been made over to him by the dacoits; that these were in his possession for some time; and that he ultimately gave them back to one of the persons who had committed the dacoity.

When the case came before the Sessions Court, Joyudee retracted these statements which he had made before the Committing Magistrate, and denied all knowledge of the dacoity.

The conditional pardon was thereupon withdrawn, a charge was drawn up against him, and he was placed on his trial along with the other ten accused persons.

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His deposition before the Magistrate was then used as evidence, not only against himself, but also against the others.

The result of the trial was, that all the prisoners were found guilty and sentenced to punishment.

They all appealed to the High Court. . .

The judgment of the High Court (1) (which, so far as it is necessary that it should be stated for the purpose of this report, was as follows) was delivered by—

FIELD, J. FIELD, J. :—

This is a case of dacoity, in which eleven persons have been convicted. Three of them, Biramdihi Mirdha, Jadu Mirdha, and Nidhūn Sirdar, have been sentenced to transportation for life; and the remaining eight, Romun Sirdar, Bhundee Mirdha, Tezu Mirdha, Tattu Khan, Jumna Ghoramee, Matu Paramanick, Komul Koiburto, and Joyudee Paramanick, to rigorous imprisonment for ten years each.

It appears that one of the accused persons, Joyudee Paramanick, was admitted as Queen's evidence by the Magistrate. When produced in the Court of the Sessions he retracted the statements made by him before the committing Magistrate, and denied all knowledge of the facts of the dacoity. . .

The Sessions Judge, thereupon, proceeded under section 349 of the Code of Criminal Procedure, withdrew the conditional pardon, placed Joyudee Paramanick in the dock, drew up a charge against him, and proceeded to try him along with the ten prisoners against whom he had been produced as a witness for the prosecution.

We are of opinion that the Sessions Judge would have exercised a wiser discretion if he had waited till the conclusion of the trial of the ten prisoners before him, and then (as required by section 349), before passing judgment concerning these prisoners, had proceeded under section 349 of the Code of Criminal Procedure in respect of the approver.

The deposition given by Joyudee Paramanick before the Committing Magistrate was used by the Sessions Judge at the trial as

(1) WHITE and FIELD, JJ.

evidence, not only against the accomplice himself, but also against the other ten prisoners. That it was evidence against the accomplice there can be no doubt, as the law expressly provides that it shall be admissible in evidence against him (section 349, Criminal Procedure Code). Whether, however, it could be used as evidence against the remaining prisoners is a point as to which, in our opinion, there must be grave doubt. The Sessions Judge relies upon section 249 of the Code of Criminal Procedure as amended by Act XI. of 1874. This section is as follows: "When a witness is produced before the Court of Session, or before the High Court in the exercise of its Original or Appellate Criminal Jurisdiction, the evidence given by him before the Committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of *the accused person*." It is certainly true that the approver, Joyudee Paramanick, was produced in this case as a witness before the Court of Session; but, as soon as the pardon was withdrawn, and he was placed on his trial, he ceased to sustain the character of witness: and it may, therefore, be that the provisions just quoted were no longer applicable.

As this case has not been argued, we are unwilling to decide that the deposition of an approver witness under the above circumstances is absolutely irrelevant: but we think, having regard to the discretion expressly vested in the Judge by the section, and to the circumstances of this particular case, that that deposition ought not to have been used as evidence against the accused other than Joyudee Paramanick; and, if upon the true construction of the law, it can be supposed to be properly admissible, we think that the value to be attached to it is so exceedingly small that it ought not to affect the case made against these prisoners by the rest of the evidence. For the purposes of this judgment we shall therefore put it aside, and examine the other evidence against each of the accused.

[The learned Judge then examined the evidence against the various prisoners.]

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[CRIMINAL APPELLATE JURISDICTION.]

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July 16th.No. 433 of
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GOGAN CHUNDER GHOSE APPELLANT ;

AND

THE EMPRESS RESPONDENT.

*Evidence—Judgment of Civil Court directing prosecution inadmissible in evidence
in Criminal Court—Fury, Charge to.*

In a civil suit upon a kistbundi bond, the Moonsiff, before whom the case was tried, was of opinion that the signatures on the bond were forgeries, and he dismissed the suit, at the same time directing a prosecution for forgery, and for using the document as genuine, knowing it to be forged.

At the trial by the Criminal Court, the judgment of the Moonsiff was admitted in evidence, and the substance of his judgment referred to by the Judge in his charge to the jury.

Held that the judgment of the Moonsiff was inadmissible in evidence.

THIS was an appeal by the prisoner Gogan Chunder Ghose against a conviction under section 471 of the Penal Code, and a sentence of five years' rigorous imprisonment.

The circumstances are stated at length in the judgments of the High Court.

M. M. Ghose and *Baboo Baikant Nath Dass*, for the Appellant.

The following judgments were delivered by the High Court (1):—

WHITE, J. WHITE, J.:—

This is an appeal by the prisoner Gogan Chunder Ghose against a conviction under section 471 of the Code, and a sentence of five years' rigorous imprisonment.

The circumstances out of which this prosecution arose are these: The prisoner had brought a suit against Basheeram Mondle, and his two brothers, Babooram and Dharani Dhar Mondle, for the recovery of Rs. 726, being the amount of principal and interest due upon a kistbundi bond alleged to have been executed in favour of the prisoner by the three brothers.

The Moonsiff found that the bond had been executed by one

(1) WHITE and FIELD, JJ.

of the three, Dharani Dhar, but dismissed the suit, because he was of opinion that the signatures of the other two defendants, Basheeram and Babooram, were forged, and he entertained so strong an opinion upon this point that he directed this prosecution, which we are now considering, to be instituted against the prisoner for forging the kistbundi, and using it as genuine, knowing it to be forged.

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The case has been tried by a jury, and they have come to a unanimous verdict that the prisoner is guilty of using this bond knowing it to be forged; and, in answer to a question, they said that they found the signatures of Basheeram and Babooram to be forged, but the signature of Dharani Dhar to be genuine. At the trial the judgment of the Moonsiff in the civil suit, although objected to on the part of the prisoner, was put in evidence by the prosecution, and read out to the jury, and the substance of the judgment was also referred to by the Sessions Judge in his charge to the jury.

The ground of the appeal is, that this judgment was improperly admitted as evidence, and that, eliminating the judgment, there is not sufficient evidence to justify the verdict. There can be no doubt that the judgment was improperly received. Technically it was inadmissible, because it was not between the same parties, the present parties technically being the Queen-Empress on the one hand, and the prisoner on the other, and the respective parties in the civil suit being the prisoner and the three defendants; and furthermore it was not admissible on the substantial ground that the issues in the civil and criminal suit were not identical, and that the burden of proof rested in each case on different shoulders. It was not necessary for the Moonsiff in the civil suit to find more than that the execution of the bond by the three defendants was not proved. When the Moonsiff went farther, and pronounced the bond a forgery, and directed a prosecution, it was not a decision on the question of forgery, but merely an opinion which, although he was entitled to give expression to it, ought no more to have been put in evidence on the present charge than the opinion of a Magistrate who commits a prisoner to take his trial upon a criminal charge.

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The Judge, in his summing-up, draws the attention of the jury to this judgment, and to the Moonsiff's opinion contained in it, and uses the following words: "The Moonsiff believed that one of the brothers, Dharani, executed the documents, and that the other names were added afterwards by the prisoner with a dishonest intent. Whether this, or whether all three names are forgeries, the offence is the same." It is true that the Judge later on says to the jury: "You are not in any way bound by the finding of the Moonsiff;" and that he also still later on draws their attention to the fact that, in the civil suit, the *onus probandi* was on the prisoner, whereas, at the trial for forgery, the *onus* was on the prosecution. But, inasmuch as neither the judgment nor the Moonsiff's opinion were evidence, the Judge, if he referred to them at all, ought to have told the jury not merely that they were not bound by them, but that it was their duty to dismiss them altogether from their minds. We have next to consider whether, independently of the objectionable evidence, there is sufficient evidence to justify the verdict of the jury; and, in deciding this question, we must bear in mind that we are not dealing with the decision of a Judge sitting either with or without assessors, but with the verdict of a jury—a species of decision with which this Court will not interfere except upon very substantial grounds. " "

The evidence for the prosecution consists of the Moonsiff who directed the prosecution, and also of two pleaders who were concerned in the civil trial, and who appear to have been called for the purpose of proving a fact not disputed, namely, that the kistbundi, with the signatures of the three defendants, was used by the prisoner as genuine in the course of that trial. The only other witnesses are Basheeram and Dharani Dhar, two of the parties whose names appear on the bond as signatures. Their brother, Babooram, whose name also appears on the bond as a signatory, has not been called as a witness by the prosecution, although the jury has found that his signature is forged as well as Basheeram's.

Dharani's evidence may be dismissed from consideration with the observations that the jury did not believe him, although he stoutly denied before them, as he did also

before the Moonsiff in the civil suit, that he ever executed the bond, the jury have found that he did. The evidence for the prosecution, therefore, rests upon the testimony of Basheeram alone, supported, no doubt, by the suspicious appearance of his and his brother Babooram's signatures on the bond, but, on the other hand, weakened materially by the facts that Dharani, one of his brothers, is found to have given an entirely false account as to how this name came to appear on the bond, and that Basheeram himself admits that he and the prisoner had disputes about land, and are consequently on bad terms, and have been so during the last year.

On the other hand there was produced before the jury a considerable body of evidence for the defence, consisting, first, of the stamp-vendor and two villagers, apparently neighbours, who speak about an attempt made to settle the suit, as to which the Judge observes in his charge that it is impossible that the attempt should have been made if Dharani and Basheeram were speaking the truth; and, secondly, of three of the attesting witnesses to the bond, who depose to having seen the bond executed by the three brothers.

Such being the state of the evidence, we think that, throwing out the inadmissible evidence, there was not sufficient evidence to justify the verdict.

We further think that, considering the extreme weakness of the case for the prosecution, it is improbable that the jury could have given that verdict, unless they had been influenced, in favour of the prosecution by the Moonsiff's opinion as expressed in his judgment.

The jury evidently disbelieved the six witnesses called for the defence, and they probably did so, because it failed to account for the peculiar appearance presented by the signatures of Basheeram and Babooram. This appearance is undoubtedly very suspicious. The two signatures are on a line, and seem to have been squeezed in between Dharani's signature and the official stamp. Supposing the two signatures to be genuine, it is extremely probable that Dharani signed first, and that the signatures of Bashee and Baboo were written afterwards above Dharani's signature. The attesting witnesses, however, unmistakeably deposed that Basheeram signed first, Babooram next, and Dharani last.

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It is quite possible that the jury may, in addition to the weight which they gave to the Moonsiff's judgment and opinion, have acted upon the evidence of Basheeram, because they disbelieved the defence. If they did so, it was in spite of the caution of the Judge, who very properly told them that no failure of the defence could count against the prisoner, unless they were of opinion that the cause for the prosecution was proved. If we had thought that, leaving out the Moonsiff's judgment, there was evidence which, if believed, pointed, with reasonable certainty, to the guilt of the prisoner, we should, while setting aside the conviction, have directed a new trial. But we are of opinion that the evidence for the prosecution is not of that character, and must, therefore, set aside the conviction and sentence, and direct the discharge of the prisoner.

FIELD, J. FIELD, J. :—

I also am of opinion that the judgment of the Moonsiff was not admissible in the case before the Court of Session.

It is true that the Sessions Judge told the jury that they were not bound by the finding of the Moonsiff, but, in the commencement of his summing up, he said that "the Moonsiff believed that one of the brothers, Dharani, executed the document, and the other names were added afterwards by the prisoner, or with his knowledge, and with a dishonest intent." This passage is not introduced in the course of argument, or with reference to other matters, but the opinion of the Moonsiff is placed directly and in an unqualified manner before the jury.

Farther on, in the summing up, where the Sessions Judge told the jury that they were not bound by the finding of the Moonsiff, he again mentioned the fact that the Moonsiff had told them that the appearance of the bond convinced him that the signatures of the two elder brothers had been fraudulently added, although, as far as Dharani is concerned, he believes that the signature is genuine.

This, I observe, is introductory to an argument which ultimately turned in favour of the accused.

I think, however, that there can be no reasonable doubt that the reception of the Moonsiff's judgment as evidence, and the reference made by the Sessions Judge to the Moonsiff's opinion

in his summing up, produced a considerable impression on the minds of the jury. But for that impression, I think it highly probable that the jury would not have convicted on the rest of the evidence in the case; and I think that, in the discharge of the duty laid on this Court, it is impossible for us to say on the evidence, which remains after eliminating what was improperly received, that the accused should have been convicted.

I therefore concur in setting aside the verdict of the jury and the sentence passed in consequence.

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[CRIMINAL REFERENCE.]

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AND

CHEDI RAI

*Criminal Procedure Code (Act X. of 1872), section 297—Revision—Acquittal—
 Practice of High Court as to revision in case of acquittal.*

It is not the practice of the High Court to interfere, by way of revision, under section 297 of the Code of Criminal Procedure; with an acquittal against which the Government may appeal.

CRIMINAL REFERENCE submitted by the Officiating Magistrate, of Shahabad in respect of an acquittal on a charge of perjury.

The following order was made by the High Court (1) :—

It is not the practice of this Court to interfere, by way of revision, under section 297 of the Code of Criminal Procedure, with an acquittal against which the Government can appeal if so advised. We must decline to interfere.

[CRIMINAL JURISDICTION.]

EMPRESS

AND

PORESHOLLAH SHEIKH

1880
Aug. 24th.
 No. 199 of
 1880.

Criminal Procedure Code (Act X. of 1872), section 446—Procedure—Charge framed by Committing Magistrate—Irregularity.

Where an accused person is committed to take his trial on specific charges before the Sessions Court, the Judge has no power, under section 446 of Act X. of 1872, to expunge a charge before calling upon the accused to plead to it.

THIS was a motion to set aside an order made by a Sessions Judge.

The facts appear from the judgment of the High Court (1), which was as follows :—

The record shows that the Committing Officer in this case sent up the accused to be tried under sections 323 and 325 of the Indian Penal Code. The Sessions Judge, before calling upon the accused to plead, expunged the charge under section 325. We think he had no power to do this under the Criminal Procedure Code, section 446. The prisoner should have been called upon to plead to both the charges. If the accused had pleaded not guilty to the charge under section 325, the Sessions Judge, after recording evidence, might have recorded a finding in favour of the accused under section 251, if there were no evidence to support the charge under that section. Let the record be sent back, and the attention of the Sessions Judge be drawn to this irregularity in this proceeding.

(1) MITTER and MACLEAN, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

1880
July 31st.
No 68 of 1880. SUMSSHERE KHAN AND OTHERS . . . APPELLANTS;
AND
THE EMPRESS . . . RESPONDENT.

Indian Penal Code (Act XLV. of 1860), section 300, exception 5—Culpable homicide—Consent, Risk of death taken by.

The 5th exception to section 300 of the Indian Penal Code extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risks of death with his own consent. It is not confined to the case where a man consents to suffer death, but extends to the case of an armed man who deliberately fights with another whom he knows to be armed, and thereby consents to take the risk of death. [See, however, *Empress vs. Rohimuddin*, 4 C. L. R. 285, where a contrary opinion was expressed.—ED.]

APPEAL from convictions and sentences passed by the Sessions Judge of Mymensingh.

Bonnerjee and Wood and Baboo Nullit Chunder Sen, Baboo Jogesh Chunder Roy, and Moonshee Serajul Islam, for the Appellants.

Baboo Doorga Mohun Doss, for the Respondent.

The following judgments were delivered by the High Court (1):—

WHITE, J.:—

This is an appeal against the conviction of the five appellants named Sumsshere Khan *alias* Sardar, Abdul Rohoman, Moonshee Saheb Khan, Nasimudi Meah, and Fakiroollah Khan, for murder committed in the course of a riot, and for which offence they have been severally transported for life.

The evidence extends to a very great, and in my opinion a very unnecessary, length. It is full of repetitions, and yet the

(1) WHITE and FIELD, JJ.

inquiry in some important respects has not been as searching as it might have been. It is clear, however, that a very serious riot took place in a village called Satshailla on the morning of the 17th January of this year, which resulted in the wounding of one man and the death of another. Two of the shareholders of a portion of a share in the village, named Kurreem Sardar and Dost Mahomed, having quarrelled about their shares, sold each of them a fraction of his share to two rival zemindars, Khan Saheb and Dwarka Nath Roy, with the object of enlisting two powerful neighbours in the dispute. The purchase by Khan Saheb was taken in the name of his son Hafiz. It would appear that Kurreem Sardar, when he sold, was not in possession of his share, and that Khan Saheb, shortly before the riot took place, had been taking steps to get possession of the fractional part which he had bought, and, for that purpose, had erected a cutcherry on the land of the prisoner, Fakiroollah, who is described as a small talookdar in the village, and who had become a partisan of Khan Saheb. This step was followed very soon afterwards by the introduction of some lathials into Fakiroollah's bari. On the morning of the 17th of January, Dost Mahomed also collected a number of persons in his homestead.

As to the origin of the riot, which took place on that morning between the factions, we think that the most reliable evidence is that of Nubbee Buksh, the constable, who has, some days previously, been deputed by the authorities to keep peace in the village, and who was on the spot whilst the riot was going on. From his evidence it appears that Dost Mahomed and some of his party came down that morning to Fakiroollah's bari; that the constable, then seeing preparations being made on both sides, which led him to believe that a breach of the peace was imminent, had a report drawn up, which he forwarded to the thannah, with a request that the Inspector of Police would attend, but, before the Inspector could arrive, the two factions, with armed men on both sides, met in conflict in a field of Dhanoo Sircar just outside the borders of Fakiroollah's bari. After a short fight, Gariboollah, who was one of Dost Mahomed's party, was wounded in the stomach with a spear.

[CRIMINAL.]

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Upon this Dost Mahomed's party fled eastwards to a jack tree, about 50 yards off, pursued by Khan Saheb's party; that there Dost Mahomed's party were reinforced by some more partisans armed with spear and lathies, when Khan Saheb's party, in their turn, took to flight, but having fled about 80 yards were rallied near some mango trees.

WHITE, J. The fight then recommenced, and very soon afterwards a man named Khowaz, who also belonged to Dost Mahomed's party, was killed.

A great deal of argument has been addressed to us to show that Khan Saheb's party was a lawful assembly collected together for the defence of the cutcherry which had been erected on Fakiroollah's land. It may be that there was a motive of defence in collecting the party in the first instance, but judging them from their acts and conduct, and from what subsequently took place, we think there can be no reasonable doubt that they were originally assembled for purposes of offence as well as defence; that the purpose was, by means of criminal force or show of criminal force, to enable Khan Saheb to assert his right, or supposed right, of collecting the rents of the share which he had bought; and that, when, on the morning of the 17th, knowing that Dost Mahomed had collected a band of men to oppose them, and that he and some of his partisans had come down to Fakiroollah's bari with hostile intention against them, thus issued armed from Fakiroollah's bari, they so issued with the common object of fighting Dost Mahomed's party. The evidence, no doubt, shows that Dost Mahomed's party were in a manner the aggressors on that morning, and had done acts for the express purpose of provoking Khan Saheb's party to come forth from Fakiroollah's bari, or which, at least, were calculated to provoke the latter; but, on the other hand, it is clear that Khan Saheb's party were quite willing to accept any challenge from Dost Mahomed or his party. The members of the two assemblies, or a large portion on each side, were armed with deadly weapons, such as lathies and spears, and on the side of Khan Saheb's party, at least, there was a large number of professional fighting men. We look upon what took place, from the time that Khan Saheb's party issued from the bari until the death of Khowaz, as one

continued fight, although it consisted of more than one stage, and we think that it was in the prosecution of the common object of fighting that Gariboollah was wounded and Khowaz killed. We have not now before us the persons who actually inflicted the grievous hurt on the one, and the death-wound on the other; but, before considering the extent to which the five prisoners are responsible for what occurred, we will state the view that we take of the crimes committed by the wounding and killing.

As regards the wounding of the man Gariboollah, we considered that that has been proved most satisfactorily to be grievous hurt. The wound was a spear wound which penetrated the skin of the abdomen. It was a severe wound, and resulted in the man being, as the Doctor proves, more than twenty days in hospital. But, for the interposition of Providence, the man might have lost his life, for, if the spear had entered the abdomen, it probably would have ended in death.

With regard to the man who was killed, we are of opinion that the offence committed by killing him is culpable homicide, but does not amount to murder, inasmuch as Khowaz was an adult, and his death occurred in the course of a fight between two bodies of men who were deliberately fighting together, both sides being armed, or a greater part of the men on both sides being armed, with lathies or spears, which are deadly weapons, and no unfair advantage appearing upon the evidence to have been taken by the one side over the other in the course of the fight.

On this point I would refer to the case of the *Queen vs. Kukur Mother*, decided on the 13th November 1877 by a Bench of which I was a member. In that case I considered, at some length, what was the character of the offence where death was caused under circumstances similar to the present. I then held that the offence did not amount to murder, because it came within the 5th exception to section 300 of the Indian Penal Code. After alluding to the difference between the English and the Indian law on the subject as regards voluntary culpable homicide by consent, I said, "a man, who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life, and as he

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voluntarily puts himself in that position, he must be taken to consent to incur that risk. If this reasoning is correct as regards a pair of combatants, fighting by premeditation, it equally applies to the members of two riotous assemblies who agree to fight together, and of whom some on each side, are, to the knowledge of all the members, armed with deadly weapons." Some of the Judges of this Court entertain a different view to mine as to the applicability of the 5th exception to a case of a premeditated fight for two reasons: *First*, because the party who is killed does not intend to get himself killed if he can help it. But the language of the exception is not confined to the case where a man consents to suffer death, but extends to the case where he consents to take the risk of death. Although it was Khowaz's intention to escape death if he could, yet he not the less ran the risk of death, when he, an armed man, joined in encountering armed men, and he did this voluntarily, and, therefore, with his own consent.

The *second* reason is because a sudden fight forms the subject of an express exception, namely, the 4th exception. Hence it is argued that the Legislature could not have intended that premeditated fight was one of the cases prescribed for by the 5th exception. This argument does not appear to me to be based upon a sound construction of the 5th exception.

Consent, voluntarily given by an adult, implies in every case premeditation. In suttee, which, according to the universal opinion, falls within the 5th exception, the widow deliberately intends to die by burning, and the relative who fires the funeral pyre on which the widow mounts deliberately and with the utmost premeditation does an act with the intention that the widow shall be burned to death. There is nothing, therefore, in the fact that the fight is premeditated, which ought to exclude it from the operation of the 5th exception. If, as I think according to the common and natural meaning of the words, an armed man, who deliberately fights with another man, whom he knows also to be armed, consents thereby to take the risk of death. Why is the adversary who kills him to be excluded from the benefit of the 5th exception, because, by another exception, the case of a man who kills his adversary in the course of sudden fight is specially provided for. The circumstances under which a man slays his opponent

in sudden fight are different from those where he slays him in premeditated fight; and, if the Legislature intended, that the offence of both should be only culpable homicide, the intention would naturally be shown by the enactment of two distinct exceptions. Again sudden fight is a distinction recognized by the English law of homicide, and the framers of the Code may easily be supposed to have, for that reason alone, made sudden fight the subject of a distinct exception without imputing to them the intention of thereby impliedly excluding from the 5th exception a case of premeditated fight, if it actually falls within the meaning of the exception. The sound construction to my mind is, that the 5th exception extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risk of death with his own consent; and that the 4th exception is an independent exception, applying to all cases of death occurring in the course of sudden and unpremeditated fight, and does not, in any way, limit the natural operation of the 5th exception.

I will now consider that share which each one of the prisoners had in the riot, and how far each was responsible for the offences committed in the course of it. As regards the prisoners Sumsshere Khan and Nassimuddi Meah, we think it is clear upon the evidence that they were each present throughout the fight, and were each armed with a deadly weapon, both when Garibollah was wounded, and also when Khowaz was killed; and they must, in our opinion, be held, by virtue of the 149th section of the Penal Code, to be responsible for the two offences—of voluntarily causing grievous hurt and of culpable homicide—which were committed in the course of the fight. Each of these offences is such as they must have known to be likely to be committed in the prosecution of the common object of fighting, when the assembly, which had that common object, was armed, or the greater part of it was armed, with deadly weapons, the prisoners themselves being amongst the number so armed. Under such circumstances what more likely than that some of the opposite faction should be badly wounded, or that even life should be sacrificed. We therefore convict Sumsshere Khan and Nassimuddi Meah of grievous hurt and culpable homicide com-

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mitted in the course of this riot. Neither of these men are inhabitants of the village of Saitsbootta, but belong to a class who are employed to fight, or are retained in the service of turbulent landholders for purposes of violence.

The proper sentence which we think ought to be passed upon each of them is two years' rigorous imprisonment for the grievous hurt, and four years' rigorous imprisonment for the culpable homicide, the latter sentence to take effect at the expiration of the former.

We also think that it is clear upon the evidence that Khan Saheb was present at the second stage of the fight when Khowaz was killed, and was himself armed with a deadly weapon; but that there is a reasonable doubt as to whether he was present at the first stage of the fight. That doubt is founded upon this, that the constable, Nubbee Buksh, and the chowkidar, Sreenath Malee, the two witnesses on whom the Judge appears to have placed most reliance in the Court below, do not bring him upon the scene until the second stage of the fight. It is true that the other witnesses say that Khan Saheb was in the first fight; but of these witnesses some are so decidedly partisans that it would be quite unsafe to act upon their evidence upon a question of identification, and as regards the rest of them who are chowkidars, they are ryots of Dost Mahomed or Dwarkanath, and exhibit so much sympathy with Dost Mahomed's faction that their evidence must be received with very considerable caution. Khan Saheb is a villager of Saitsbootta, and holding him to be responsible for the culpable homicide only, we sentence him to four years' rigorous imprisonment.

The prisoner Abdul Rohoman Moonshee was one of the amlas of Khan Saheb, for whom this cutcherry was erected on Fakiroollah's ground. We think that there is sufficient evidence to show that he was present at both stages of the fight, and under circumstances which make him responsible, both for the grievous hurt and for the culpable homicide. Moreover, he was one of the two amlas of Khan Saheb's who gave orders to the lathials concealed in Fakiroollah's house, and directed their movements at the commencement at least.

That being so, his offence is graver than that of the lathials.

who obeyed his orders. The sentence which we shall pass on him is, that for the grievous hurt he be rigorously imprisoned for four years, and for the culpable homicide for six years; the sentence to be cumulative, making an aggregate punishment of ten years' rigorous imprisonment.

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With regard to Fakiroollah Khan, who was owner of the bari where the lathials were concealed, we think that we cannot accept the evidence which makes him present at any stage of the fight: but there is sufficient evidence to show that he abetted the riot. It is clear that he harboured, in his premises, a considerable number of lathials; that, in order to do this, he, two or three days before the riot, upon some pretext which turned out to be false, got rid of the constable Nubbee Buksh who had, up to that time, been lodging in his bari.

It is abundantly clear that the lathials on Khan Saheb's side, or at all events a considerable number of them, were concealed in Fakiroollah's bari when Nubbee Buksh came there on the morning of the 17th January; that, when Nubbee Buksh wanted to enter the bari in order to ascertain what lathials were there, and, if he was able to do so, to arrest them, Fakiroollah came prominently forward, and defied him to enter-making a false statement that his family were within the place. Nubbee Buksh was baffled by the false statement, but almost immediately afterwards there issued from the bari a body of lathials armed with spears and lathies. At the time when Nubbee Buksh demanded to enter the bari, Dost Mahomed and some of his party were alongside of the constable, and Fakiroollah must have been aware, when he refused access to his bari; that the lathials of Khan Saheb were collected together for an unlawful purpose, and were armed with deadly weapons; also that Dost Mahomed was acting in a way to provoke the lathials of Khan Saheb to come forth, and that a riot was imminent, unless the constable was allowed to interfere, and do the best to prevent it.

Under these circumstances, we think that Fakiroollah intentionally aided and abetted the riot which took place.

We therefore convict him of the offence of abetting the riot, and sentence him to three years' rigorous imprisonment, and

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also to a fine of Rs. 500, and, in default, to further rigorous imprisonment for nine months.

The convictions and sentences passed by the Sessions Judge will be set aside, and the conviction and sentences which I have mentioned above will take their place.

FIELD, J. :—

I concur in the judgment which has just been delivered.

I think that it is very clear that, on the morning of the 17th, a considerable number of armed lathials were collected in the village on the part of Khan Saheb, and a considerable number on the part of Dost Mahomed.

What actually occurred was, this: The constable, having paid a visit to Dost Mahomed's bari, and having had reason to believe that a number of men were collected there, went over to Fakiroollah's bari, and there found the same state of things. It appears that a number of Dost Mahomed's people followed the constable, and took up a position on certain land belonging to one Dhanoo Sircar, south of, and immediately adjoining, the homestead land of Fakiroollah, when the constable, having had a report written, and having sent it to the thannah by Bhogwan Chowkidar, came out of the cutcherry recently erected on Fakiroollah's land south of this bari or homestead. Dost Mahomed represented to him that a number of armed men were collected within the homestead of Fakiroollah, and urged him (the constable) to arrest them. When the constable hesitated to do so, Dost Mahomed called his own men to assist him in carrying out his expressed intention of doing so himself. It would appear either that a considerable number of Dost Mahomed's men had remained behind at Dost Mahomed's bari, or that Dost Mahomed miscalculated the strength of Fakiroollah's party. Be this as it may, Fakiroollah's people did not wait for Dost Mahomed's men to come on Fakiroollah's land, but they took the initiative, and crossed the boundary line into the land of Dhanoo Sircar, and there the riot commenced and first took place.

Under these circumstances, I think it is impossible to say that Khan Saheb's party were acting on the defensive merely, or, in other words, were acting in the exercise of the right of

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private defence of person or property. It is quite clear that both parties were armed, and both parties were prepared to fight, and that a trivial incident was sufficient to bring them into conflict. I think it is presumable that, in entering upon that conflict, each party had for its object to fight for victory, and, in doing so, knowingly and deliberately took upon itself the risk of the encounter.

In this state of facts, I agree that the 5th exception to section 300 of the Penal Code is applicable; and I do not think it very material which party were, in the first instance, the actual aggressors, though this should be considered in awarding the punishment. When a man being one of an armed band, and, being himself armed with a deadly weapon (as there is evidence to show that Khowaz, who was on this occasion killed, was armed), takes part in a fight, and uses that deadly weapon against his opponents, I think it is reasonable to say that he was within the 4th clause of section 300, committing an act which he knew to be so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death; and I think further that he committed such act without any excuse for incurring the risk of causing death, or such injury as has just been mentioned. When he and his party are opposed by a number of persons similarly armed, and using their arms in a similar way, I think it is reasonable to say that such person, within the meaning of exception 5, takes the risk of death with his own consent.

As to the actual share which each of the appellants took in the *Nutee*, I have nothing to add to what has already been said by my learned colleague.

With reference to the enormous length of the record, I desire to add that, while a vast mass of irrelevant evidence, more especially concerned with the steps taken by the police after the occurrence in order to bring the accused to punishment, has been recorded at very great length, the examination of the witnesses as to the actual facts of the occurrence, and the part which each individual took in the affray, is extremely meagre and unsatisfactory.

The Sessions Judge has, in his judgment in this case, made  
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reference to the evidence recorded in the counter-case, and it would appear that his mind was, to a certain extent, influenced by that evidence. This was erroneous, as there was no agreement of the parties that the evidence taken in one case should be used on the other.

I concur in setting aside the sentences passed by the Sessions Judge, and in substituting, therefore, the sentences just pronounced.

[CRIMINAL REFERENCE.]

July 9th.  
 No. 948 of  
 1880.

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AND

TARACHAND BAGDI AND OTHERS.

*Criminal Procedure Code (Act X. of 1872), section 296—"Sessions case."*

The term "Sessions case" in section 296 of the Code of Criminal Procedure refers to cases triable by a Court of Session only. *Empress vs. Karshan Singh*, L. R., 1 All. (F. B.) 413, and *Foy Kurn Singh vs. Man Patuck*, 21 W. R. 42, followed.

CRIMINAL REFERENCE submitted by the Sessions Judge of Burdwan on the 15th June 1880. The terms of the reference were as follow :—

The prisoners in this case were arrested on a charge of robbery under section 392 of the Indian Penal Code, and the offence was inquired into by Mr. Sevestre, a Magistrate of the 1st class, who, on 27th April last, after full inquiry, discharged the prisoners on the charge of robbery, considering that there was no sufficient evidence against them. The only direct evidence against the prisoners was that of the carter, who identified them as the four robbers, and his evidence was somewhat weakened by that of the complainant, who said that all the four robbers had their heads covered up. The carter's evidence was also weakened to some extent by the fact that it was nearly dark at the time of the robbery (about 4 A. M.), for the moon was just setting then.

The Magistrate of the District, Mr. Wyer, sent for the

record of the case, and, by the following order passed under section 396 of the Code of Criminal Procedure, directed the four prisoners to be committed for trial before this Court :—

"In this case I sent for the record, thinking that there might be sufficient grounds for committing the accused on a charge of robbery or dacoity.

"The facts of the case are most clearly stated in the judgment of the Deputy Magistrate, Mr. Sevestre, who has come to the conclusion that, though there is evidence sufficient to convict three of the accused under section 202, yet there was not sufficient proof to warrant a commitment under section 392.

"On the first point the evidence, I think, is sufficient ; but the prisoners have appealed, and the Sessions Judge will decide that matter.

"On the second point I think that, if the accused had made no statement to the Assistant Magistrate, the Deputy Magistrate is perfectly right ; but, before discharging the accused, he should have taken into consideration those statements, and he would have been justified in thinking there was a good *prima-facie* case against all the accused under section 392. Accordingly, I direct the Deputy Magistrate to commit the accused to take their trial under that section."

Mr. Sevestre accordingly committed the prisoners by an order dated 1st June, which appears to be irregular.

According to the ruling given in 21 Weekly Reporter, page 41 (Criminal Rulings), it appears that the words "Sessions cases" in section 296 mean cases triable by the Court of Session only. In the present instant the charge is robbery, which is triable either by this Court, or by Mr. Sevestre. The order of the Magistrate of the district dated 19th May, and the commitment-order of the Deputy Magistrate, Mr. Sevestre, dated 1st June, consequently appear to be irregular. I should add that the only prisoner who was defended by a pleader raised this objection on 1st June before the commitment-order was passed.

As I am in doubt whether I should quash the commitment under section 33 of the Code of Criminal Procedure, or refer the case for the orders of the High Court, I have taken the latter course.

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 Reference.

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The explanation of the Magistrate was as follows :—

“ \* \* I have the honor to point out that the offence of robbery does, I believe, come within the definition of ‘Sessions cases,’ given in section 4 of the Criminal Procedure Code. The Deputy Magistrate did not ‘try’ the case himself, since no charge was drawn up, and therefore the case is not a Magistrate’s case as defined in the same section. Consequently I think my order of commitment is valid.”

The following order was passed by the High Court (1) :—

TOTTEN-  
HAM, J.

TOTTENHAM, J. :—

We are bound to follow the ruling quoted by the Sessions Judge, *Joy Kurn Singh vs. Man Patuck*, 21 W. R., Cr., 41, as to the meaning of the term “Sessions cases” in section 296, Code of Criminal Procedure. A Full Bench of the High Court of Allahabad has come to the same conclusion in the case of *Empress vs. Kanchan Singh*, I. L. R., 1 All. 413, and it has also been adopted by the Madras Court.

That being so, we must hold that the Magistrate had no power to direct the commitment now in question. We accordingly direct that it be quashed.

(1) TOTTENHAM and FIELD, JJ.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF DEVI DUTT AND OTHERS... PETITIONERS.

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Aug. 26th.

*Evidence in proceedings before Magistrate—Records of Offices subordinate to Magistrate—Record of former proceedings before another Magistrate.*

A Magistrate trying a case is as much bound by strict rules of evidence as any Sessions Judge or Civil Court.

Where proceedings, which had already been taken against the accused before another Magistrate, had been quashed, and a new trial directed, the Magistrate holding the second trial is not justified in referring to the former record as a whole, but only to such portions of it as have been specially put in evidence before him.

THIS was an application to set aside certain convictions and sentences passed by the District Magistrate of Bhaugulpore.

The circumstances of the case are fully set forth in the judgment of the High Court.

*Jackson and H. Bell*, for the Petitioners.

*Paul* (Advocate-General), for the Crown.

The judgment of the High Court (1) was as follows :—

This case, described by the Magistrate as in itself an “exceedingly simple one,” extends over more than 150 pages of evidence, followed by 23 pages of the Magistrate’s decision.

The facts are not disputed. On 12th April last, Budar Mull held a nautch in the public thoroughfare of Sujagunge at Bhaugulpore, not far from his house. There was a large concourse of spectators, and the proceedings were interrupted by “stones” thrown from the top of some of the neighbouring houses. One of the dancers, Buldeo Marwari, was struck by a “stone,” and hurt was caused to him.

On the 14th April two complaints were made to the Joint-Magistrate, one by Buldeo and the other by Devi Dutt, a resident of Monghyr. Buldeo’s complaint resulted in a trial before



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the Joint Magistrate, in which Devi Dutt and 11 others were convicted, on a summary trial on 3rd May, of an offence under section 143 of the Penal Code. They were sentenced to different terms of imprisonment, and were bound over to keep the peace.

This Court declared the proceedings void on the 27th May. On the 14th June the District Magistrate commenced fresh proceedings. He tried all the prisoners whom the Joint Magistrate had tried, and convicted 12 whom the Joint-Magistrate had convicted before: five of those discharged by the Joint Magistrate were again discharged by the District Magistrate, and two, who were *acquitted* by the Joint Magistrate, were *discharged* by the District Magistrate. One man (Ram Nauth Sahpe) was acquitted on both trials.

In awarding sentence the District Magistrate remarked that the offence "I now find them guilty of is legally a more serious offence than that of which the Joint Magistrate found them guilty," and he thereupon sentenced them to imprisonment, which amounts, in the case of Devi Dutt, to *one-fourth*, in the case of Ram Nauth Misser and Bahtone, to *one-half*, and, in the cases of the others, to *two-thirds* of the periods awarded by the Joint Magistrate.

Counsel, therefore, pointed out that, in the case of Devi Dutt, the imposition of a lighter sentence for a more serious offence had the effect of depriving him of an appeal to the Sessions Judge.

We are dealing with these cases under the first clause of section 297 of the Criminal Procedure Code; and, unless we find that there is any material error in the Magistrate's proceedings, we cannot interfere.

Several matters were urged upon our attention by the Counsel for the petitioners, the most important being—

1. Introduction of matters not legally evidence, *e. g.*, a mortuary register, and the record of the trial before the Joint-Magistrate.
2. Misappreciation of the value of the Joint Magistrate's evidence.
3. Presumption, unsupported by evidence, that Buldeo's party, to which the petitioners are said to belong, threw stones.

4. Conclusions, based on the Magistrate's inspection of the place, opposed to uncontradicted testimony.

The first of these is undoubtedly a very grave error, which has materially affected the trial of the case. The Magistrate's decision shows that he holds views as to his duty, *when acting judicially*, which, if generally adopted and acted upon, would have most illegal consequences. He describes his duty under such circumstances as follows: "He must not rest content to receive only the evidence offered by the complainant, and to judge thereon, but he must, on public grounds, seek to find out the guilty persons, and to bring their guilt home to them." And again he says: "I feel in no way bound to consider only such evidence as the complainant produces and files according to law; but I feel at full liberty to refer to, not only every paper on the former record, but also every paper and record in his own office, or in any office subordinate to him which would in any manner throw any light on the subject." We do not concur in this view of the duty of a Magistrate who is trying a case judicially; on the contrary a Magistrate trying a case is as much bound by strict rules of evidence as any Sessions Judge or Civil Court. The Counsel for the defence did no more than his duty when he wanted the case conducted according to the strictest letter of the law, as laid down for the conduct of the Sessions trials or civil cases, and we were not surprised to hear the learned Advocate-General, who appeared in support of the Magistrate's order, say that he was unable to support the very extraordinary views enunciated by the Magistrate.

The Magistrate was not justified in referring to the former record as a whole. He was right to refer to particular depositions (such as those of Buldeo and Rash Behary) which were specially put in evidence. The mortuary register, to which reference is made, is in no way proved; and the reference to it was illegal, and has materially prejudiced the defence of the accused, Ram Nauth Misser. For it, and it alone, has induced the Magistrate to disbelieve the evidence as to his absence from the scene of the occurrence.

As to the second point the Joint Magistrate gave important evidence affecting the credibility of Buldeo. He proved that,

1880  
In re  
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Judgment.

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Judgment.

on the 16th April, he examined Buldeo, the complainant, who then stated that he only recognized "Devi," although his complaint contained the names of 20 persons. Buldeo's evidence before the Magistrate contains this passage: "I told Izabutoollah (mookhtear) the names of the witnesses and accused; I told him Bissen Shastri, because four or five came with me to help, and they told me. I cannot say who suggested each name. We did it between us in consultation." When, therefore, the Joint Magistrate deposed that he particularly noticed that Buldeo would only swear to one Devi, far greater consideration was due to the argument for the accused based on his identification at the trial of ten persons. The same remark applies to the Joint Magistrate's evidence respecting the constable Rash Behary's evidence before him.

We think it unnecessary to say anything upon the third point.

As to the Magistrate's visit to the scene of the occurrence, we think that such a visit, if it was necessary, should have been a part of the trial. Witnesses should have been placed in the position they occupied at the nautch, *and the result embodied in evidence*. When the Magistrate records as the only result of his visit that he said that the whole scene would go into an ordinary-sized drawing-room, he only records what he might have done without going to the spot at all by the use of a compass, ruler, and the map. The remainder of the judgment, which deals with the other evidence in the case, it is unnecessary to set out here.

## [CRIMINAL APPELLATE JURISDICTION.]

## IN THE MATTER OF NISTARINI RAUR.

1880  
June 9th.

*Act XIV. of 1868, sections 2, 11, and 21—Registry under Act XIV. of 1868, Retention of names upon—Rules under section 21 of Act XIV. of 1868—Jurisdiction of Presidency Magistrates.*

Every woman registered under Act XIV. of 1868 has an absolute right to have her name removed from the register if she is desirous of ceasing to carry on the business of a common prostitute. And any rule, which raises any obstacle to the exercise of that right, is not in accordance with section 21 of the Act, and therefore *ultra vires*.

The Magistrate is competent, where a woman is prosecuted under section 11 of the Act, and pleads that she has ceased to be a common prostitute, and has taken steps under section 2 to obtain the removal of her name from the register, to determine whether or not her name has been lawfully retained upon the register; and if not, whether or not she had, in fact, ceased to carry on the business of a common prostitute when the proceedings were taken against her.

REFERENCE under section 240 of Act IV. of 1877 submitted by the Officiating Presidency Magistrate.

This was a case in which a woman, named Nistarini Raur, registered as a common prostitute under Act XIV. of 1868, was brought before the Magistrate, under arrest, on a complaint by the Police that she had failed to present herself for medical examination under the provisions of the Act. The woman pleaded that she had long ceased to be a prostitute, and had, since February last, made various applications to have her name removed from the register, but no notice was taken of her applications, although several letters were written on the subject through her attorney, Mr. Leslie, to the present Commissioner of Police.

The Magistrate, Mr. Gupta, found as a fact that the woman had ceased to be a prostitute within the meaning of the Act, and as the case involved important points of law, he referred the three following questions for the opinion of the High Court:—

1.—Is Rule 27 of the rules passed by the Government of  
[CRIMINAL.] C. L. R. 69.

1880,

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RAUR.*Argument.*

Bengal under Act XIV. of 1868 valid in law : and is a woman registered under that Act legally liable to arrest by a police officer, without a warrant, for omitting to attend at the periodical medical examination?

II.—Is Rule 13 of the said rules consistent with the Act : and can the Commissioner of Police in his discretion lawfully refuse to remove from the register the name of a woman who declares herself desirous of ceasing to practise as a common prostitute ; and applies for such removal?

III.—In either case is a registered woman, whose application to the Commissioner of Police for the removal of her name from the register has not met with success, precluded from pleading before the Magistrate, on a prosecution under section 11 of the Act, that she is not, or has ceased to be, a common prostitute ; and is the Magistrate competent to inquire into such a plea?

*Allan and R. N. Mitter*, for Nistarini Raur, contended that the Police were not authorized by law to arrest registered women who failed to attend at the medical examination. Rule 27 of the Government Rules, purporting to have been made under section 11 of Act XIV. of 1868, was *ultra vires*, for the section merely empowered the Local Government to make rules respecting the *times* and *places* of the examination under the Act, and generally respecting the *arrangements* for the conduct of the examination, and for recording the results thereof ; but the words of the section did not cover the rule in question.

The only case in which the Act gave a police officer power to arrest was in respect of a woman who had received notice under section 14 of Act XIV. of 1868.

No woman's name could be retained on the register against her will. The Commissioner of Police had no discretion in the matter. Upon application being made in the mode appointed by the rule, under the powers conferred by section 21, it was his duty to remove the name from the register.

Rule 13, which prescribes the procedure, and provides that applications by women to have their names removed from the register should be made in writing to the Commissioner of Police, who, if satisfied on inquiry "that the applicant has

really ceased to practise as a prostitute, may cause her name to be removed from the register," was *ultra vires*. The will of the applicant decided the matter, and the Rule was bad, inasmuch as it gave the Commissioner power to retain a woman's name on the register against her will.

The case of *In re Lukhimani Rar*, 3 B. L. R., A. Cr., 70, was an authority in point, and decided that no woman's name can be placed and retained on the register against her will; that, if a woman, after the removal of her name from the register, still continues to carry on the business of a common prostitute, she subjects herself to a prosecution of each offence under section 11 of the Act.

With regard to the third question proposed by the Magistrate, he had jurisdiction to entertain the plea raised by the defendant in this case, and it was his duty to enquire into and determine the legality of the retention of the defendant's name on the register against her will. The matter came judicially before him, and he had no option.

The Court, having taken time to consider, delivered the following judgment:—

TOTTENHAM, J. (MACLEAN, J., concurring):—

This is a reference made by one of the Presidency Magistrates of Calcutta under section 240 of Act IV. of 1877, submitting, for the opinion of the Court, three questions of law arising out of a prosecution under Act XIV. of 1868, section 11.

The first question raises a point which does not affect the case before the Magistrate, who has to decide whether the person charged before him has committed the offence imputed. We think it unnecessary to express any opinion on this point.

We think that, as every woman, registered under the Act, has an absolute right to have her name removed from "the book" if she is desirous of ceasing to carry on the business of a common prostitute. Any rule which raises any obstacle to the exercise of that right is not in accordance with section 21 of the Act. Part of the 13th rule, referred to by the Magistrate, commencing "may postpone," and ending "satisfied," appears to be *ultra vires*. We answer the second question in the negative.

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RAUR.

Judgment.

TOTTEN-  
HAM, J.

1880

*In re*NISTARINI  
RAUR.*Judgment.*TOTTEN-  
HAM, 7.

The third question refers to the Magistrate's competency to entertain a woman's plea that she is no longer lawfully retained on the register, and is therefore not liable to be punished for breach of the rules applicable to registered women. In our opinion a woman, prosecuted for an offence under section 11, is not precluded from pleading that she has ceased to carry on the business of a common prostitute, *and* that she has taken the steps prescribed by section 2 and the rules framed in accordance therewith to obtain the removal of her name from the register; and that, if it is still retained there, it is retained contrary to law. This opinion is, we think, supported by the authority of this Court in the case of *In re Lukhimani Rar*, 3 B. L. R., A. Cr., 70, to which the Magistrate refers. It was there held that the Magistrate was bound to enquire into the plea that the woman before him had not been lawfully registered, because she had not consented to it; and, on the same principle, we think that, in the present case, it is the Magistrate's duty to determine whether or not the woman has been lawfully retained upon the register; and, if not, whether she had, in fact, ceased to carry on the business of a common prostitute or not when the proceedings were taken against her.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF RADHA NATH }  
CHOWDHRY AND ANOTHER. . . . } . . . . PETITIONER.

1880  
Sept. 9th.

*Indian Penal Code (Act XLV. of 1860), sections 154, 155, 157—Conviction  
and sentence—Non-resident partner.*

No. 203 of  
1880.

To constitute an offence under section 157 of the Indian Penal Code, it must be proved that the accused has hired or engaged, or employed, other persons for the purpose of an unlawful assembly, and it is not sufficient to show that some of the accused's servants have been taken from a district where men have a well-known character as lattials, and had been in his service some time before the riot was perpetrated.

A non-resident partner or sharer, who has taken no active part in the management of the estate, cannot, like a resident sharer, be convicted under sections 154, 155, of the Indian Penal Code.

**M**OTION to set aside convictions and sentences passed under sections 154, 155, and 157 of the Indian Penal Code.

Baboo Issur Chunder Chuckerbutty, for Petitioner.

The facts of the case sufficiently appear from the judgment of the High Court (1), which was as follows:—

Radha Nath Chowdhry has been convicted under sections 154, 155, and 157, but sentence has been passed under the last section only.

We think that the conviction and sentence under section 157 is bad. The only evidence against him is that he has, in his employ, some men of the Furreedpore district. Now we gather from the judgment that the petitioner's jummanav is comes from that district, and that the Magistrate thinks (and my experience endorses the opinion) that the men of that district have a well-known character as lattials. But we think that the offence designated in section 157 is not made out by showing that the accused employs Furreedpore men, in preference to local men, as servants. To support a conviction under that section it must



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CHOWDHRY.*Judgment.*

be shown that, for the purposes of an unlawful assembly, the accused has hired or engaged, or employed, other persons. All that appears in this case is, that some of the petitioner's servants are Furreedpore men, and that they had been in his service for some time before a riot took place. We think the conviction under section 157 cannot be supported, and must be set aside.

With reference to the conviction under sections 154 and 155, we do not find any reason in the Magistrate's summary upon which we should be justified in passing sentence. There is no evidence to which we can refer, and we can therefore only say that we do not think that the conviction can be supported.

As regards Durga Kant Mozoomdar, in our opinion, he does not come under the sections. We are disposed to think that a non-resident partner or co-sharer cannot be convicted in addition to the resident sharer under sections 154 and 155. If the resident sharer brings himself under these sections, it is right that he should pay the fine which would be a fine on the sharers; but to impose a fine on an absent sharer in addition, who "has taken no active part in the management of the estate," seems to us to be unduly stretching the law. Where there is no resident sharer, but only an agent or manager, of course the absentee owner might be held liable under some circumstances.

We accordingly direct that the convictions and sentences be set aside.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF NOBO KISHORE }  
 CHUÇKERBUTTY . . . . . } . . . . PETITIONER. 1880  
S-pt. 14th.

*Criminal Procedure Code (Act X. of 1872), section 530—Order under section 530 of Act X. of 1872, to whom addressed—Penal Code (Act XLV. of 1860), section 188, Conviction under—Practice.* No. 136 of  
1880.

In the absence of evidence that an order under section 530 of the Criminal Procedure Code was in fact directed to the accused, he cannot legally be convicted under section 188 of the Indian Penal Code for disobeying such order.

*Quære.*—Whether an order under section 530 can be directed to others than the unsuccessful party to the proceedings under the section; or whether such an order could properly be directed to the public at large.

THIS was an application, under section 296 of the Criminal Procedure Code, to set aside a conviction and sentence passed by the Deputy Magistrate of Manickgunge under section 183 of the Indian Penal Code.

—Baboo *Doorga Mohun Dass*, for the Petitioner.

In this case the facts sufficiently appear from the judgment of the High Court (1), which was as follows:—

The petitioner in this case was convicted by the Deputy Magistrate of Manickgunge on the 19th May 1880 under section 188 of the Indian Penal Code, and sentenced to rigorous imprisonment for three months.

It appears that there was a proceeding under section 530 of the Criminal Procedure Code between Kumar Rajendro Narain Roy and others (the applicant's masters) 1st party, on the one hand, and Krishna Chunder Roy, 2nd party, on the other hand. On the 19th February 1877, an award was made in favour of the 2nd party. The present prosecution proceeds upon the ground that the petitioner has disobeyed this order by forcibly causing

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BUTTY.

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a portion of the land covered by the award to be ploughed. After this alleged forcible ploughing, a criminal proceeding was commenced with a view to take recognizances for the preservation of the peace. To this proceeding the petitioner was no party. In the course of this proceeding, with the consent of the parties thereto, an Ameen was deputed to inquire and report whether any portion of the land covered by the section 530 award has been ploughed or not. The report of the Ameen was that a portion of the land covered by the award in question had been actually ploughed.

Thereupon a summons was issued against the petitioner under section 188 of the Indian Penal Code. His defence mainly was: (1) that he could not be punished under section 188, as the order under section 530 was not directed to him, but his employers; and (2) that the land ploughed was distinct from the land dealt with in the section 530 award.

The Deputy Magistrate found that a portion of the land covered by the award had been caused to be ploughed by the accused, who admitted that he was present when the final order under section 530 was passed. The Sessions Judge in appeal concurred in this finding.

We think this finding is not sufficient to support a conviction under section 188, because there is no evidence to show that the order under section 530 was *in fact* directed to the petitioner to refrain from disturbing the possession of the successful party in that proceeding. A question has been raised before us that the order under section 530 can only be directed to the unsuccessful parties in the proceeding. Without expressing any opinion upon this point, and assuming that it could be properly directed to the public at large forbidding all disturbance of the possession of the successful party on behalf of any of the unsuccessful parties to the proceedings, no conviction can be sustained unless it be shown that, *in point of fact*, such an order was really issued in the section 530 proceeding. We have searched the record, and we do not find that any evidence has been given of an order in these terms having been issued in this case.

The conviction of the petitioner is, therefore, illegal, and it is accordingly set aside.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF KAZI CHUNDRA }  
 MOZOOMDAR . . . . . } .. PETITIONER;

1880  
 June 30th.

No. 1046 of  
 1879.

AND

JUGGUT CHUNDRA MOZOOMDAR ... OPPOSITE PARTY.

*Criminal Procedure Code (Act X. of 1872), section 468—Penal Code (Act XLV. of 1860), sections 191 and 193—Jurisdiction of Court—Sanction to prosecute—Oaths voluntarily taken.*

A mortgagee presented a petition in the District Court of R., under Regulation XVII. of 1806, for foreclosure of a mortgage of certain land, which, at the time of the execution of the mortgage, was situate in the district of R., but which had since been transferred to the district of Pubna. In reply it was alleged that the mortgage had been paid off, and a receipt by the petitioner was put in. The matter was, however, compromised, no evidence having been given on either side. It appeared that the petition for foreclosure was verified by the affirmation of the petitioner, although it was not necessary that it should have been so verified, and the mortgagors applied to the District Court of Pubna, within the jurisdiction of which the land now was, for leave, under section 468 of the Criminal Procedure Code, to prosecute the mortgagee under section 193 of the Indian Penal Code for giving false evidence in regard to the receipt, and such leave was granted.

*Held* that the sanction given by the Judge of Pubna was illegal on the ground that the District Court at Pubna had no jurisdiction.

*Semble.*—That, although a superior Court has no right to question the sanction under section 468 of the Criminal Procedure Code given by the Court which heard the evidence, yet, where the sanction is given by the Court before any evidence in the case has been taken, and without materials before it upon which it could properly exercise a discretion, such a sanction can be set aside.

*Barkutdallah Khan vs. Rennie*, I. L. R., 1 All. (F. B.) 17; *Ram Pershad Harsare vs. Soomuthra Dabee*, 5 W. R., Misc. (F. B.), 21.

*Quere.*—Whether a statement on oath voluntarily taken in a proceeding where an oath is not necessary comes within section 191 of the Penal Code.

**MOTION** to set aside an order of the District Judge of Pubna, sanctioning criminal proceedings against the petitioner under section 468 of the Criminal Procedure Code.

[CRIMINAL.]

C. L. R. 70.

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*M. Ghose, for the Petitioner.**In re*

KAZI

CHUNDRA  
MOZOOMDAR

v.

JUGGUT  
CHUNDRA  
MOZOOMDAR*Judgment.*

GARTH, C. J.,

The facts sufficiently appear from the judgments of the High Court (1), which were as follow :—

GARTH, C. J. :—

This is an application to set aside an order of the District Judge of Pubna, which sanctions certain criminal proceedings under the following circumstances :—

On the 17th of July 1868, a mortgage-deed was executed by Juggut Chundra Mozoomdar in favour of Kazi Chundra Mozoomdar, to secure a sum of money and interest.

On the 28th of October 1878, a petition was presented by Kazi Chundra, the mortgagee, in the District Court of Rajshahye, for the foreclosure of the above mortgage.

This petition was filed under the provisions of Regulation XVII. of 1806, and was verified (notwithstanding that such verification was not made necessary by the Regulation) in the usual way by the petitioner.

At the time when that petition was filed, the land, which was the subject of the mortgage, was situate within the jurisdiction of the Rajshahye Court ; but, since then, the Rajshahye District has been divided, and the mortgaged property has since formed part of the District of Pubna.

On the 15th of December 1874, Juggut Chundra Mozoomdar and others presented a counter-petition to the District Judge of Rajshahye, in which they stated that the mortgage-money had been paid in full to the mortgagee, and prayed that the mortgaged property might be declared free from the mortgage-charge.

In support of this petition, a registered receipt was filed by the petitioners, which certainly appeared to show, upon the face of it, that the mortgage-money had been paid in the year 1869 to the mortgagee : but the mortgagee's contention was, and still is, that the receipt was, in fact, never given to the mortgagor, and that he, the mortgagee, registered it himself ; that the mortgage-money, though intended and agreed to be paid by the mortgagor, was never paid in point of fact ; and that the mortgage-deed itself

(1) GARTH, C. J., and MACNEAL, J.

remained as indeed appears to be admitted by both parties) in the hands of the mortgagee.

On the 24th of February 1880, Kazi Chundra Mozoomdar, the mortgagee, presented another petition in the suit, in which he stated that matters had been amicably settled between himself and Sonamoney Dassee, who had purchased the mortgaged property from the mortgagor; that the mortgage-money had been satisfied: and asking that the petition in the foreclosure-suit of 1878 should be struck off the file. A decree by consent was accordingly drawn up and filed in the suit to that effect.

The mortgaged property having thus been transferred as already mentioned to the Pubna District, an application was made in July of the present year to the District Judge of Pubna on behalf of Juggut Chundra Mozoomdar, the mortgagor, for leave to prosecute Kazi Chundra Mozoomdar, the mortgagee, under section 193 of the Indian Penal Code; and the District Judge of Pubna, after reviewing the proceedings which had taken place in the Rajshahye Court, and, having regard especially to the registered receipt which had been filed by the mortgagor, gave his sanction to the criminal proceedings against the mortgagee.

The mortgagee then applied to a Division Bench of this Court to set aside the District Judge's order upon the ground that it was illegal; and the Division Bench, having ordered the proceedings to be sent for, the matter has now been argued before us by Mr. Ghose on the part of the mortgagee, the mortgagor not having appeared to support the Judge's order.

The first ground, upon which it is contended that the order is bad, is, that the Judge of the Pubna Court had no jurisdiction to make it.

Upon this ground alone it appears to me that the order is clearly illegal. The offence of which Kazi is said to have been guilty is that of giving false evidence in a judicial proceeding under section 193 of the Penal Code, and he is said to have given this false evidence in the fourth paragraph of the petition which he filed in the District Court of Rajshahye in 1878.

If this was an offence at all, it seems clear to me that the Court before which it was committed was the District Court of Raj-

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—  
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shahye, and that consequently the only Court which could give sanction to any criminal proceeding under section 468 of the Criminal Procedure Code was either the Judge of the District Court of Rajshahye or some Court to which the Rajshahye Court was subordinate.

The offence was certainly not committed before or against the District Court of Pubna, which was not in existence at the time when the alleged offence was committed.

The District Judge of Pubna appears to be under the impression that, because the land which was the subject of the mortgage had since been transferred to the jurisdiction of Pubna, the offence with which Kazi is charged must also be considered as having been committed before the District Court of Pubna.

But this is clearly a mistake. The question is not within what jurisdiction the mortgaged property is now situate, but before what Court the offence was committed; and there is no doubt that the offence (if any) was committed before the District Court of Rajshahye.

I think, therefore, that, upon this ground alone, the sanction given by the Judge of Pubna is illegal.

But it was further contended by Mr. Ghose that, even assuming the Judge to have had jurisdiction, he had no evidence or materials before him which would legally justify his making the order.

It is not necessary for our present purpose to decide this further question, but, as it is possible that another application of a similar nature may be made to the Rajshahye Court, I think it right, as the question has been raised, to express my views upon it.

In the case of *Barkutullah Khan vs. Rennie*, 1 L. R., 1 All. 17, it was held by a Full Bench at Allahabad that, when the Court in which the evidence in a case has been given has, under section 46, of the Criminal Procedure Code, sanctioned criminal proceedings no superior Court has any right to question the propriety of that sanction.

And, in the case of *Ram Pershad Hazaree vs. Soomuthra Dabee*, 5 W. R., Misc. Rulings, 24, it was held by a Full Bench of this Court that, where, in the course of a suit, a Civil Court commits a

party for trial, or sanctions criminal proceedings against him, on a charge of perjury or forgery, the High Court cannot, as a Court of Revision, reverse such sanction or order upon the ground that it was not warranted by the facts.

There are also other cases to the same effect, but I do not understand any of these cases to go so far as to decide that, when a Court before which a case is pending sanctions criminal proceedings against one of the parties to that suit, *before any evidence in the case has been given, and without any materials before it, upon which it could properly exercise a discretion*, the sanction cannot be set aside.

It seems to me that the reason of the rule laid down in section 468 consists in this: That suitors in a Court of Justice ought to be allowed the fullest liberty of speech and action in support of their respective contentions; and, so long as they use that liberty in good faith and honesty, they ought not to be subjected to malicious prosecutions.

The Court which has the best means of forming an opinion upon the *bona fides* of the parties and the truthfulness of the witnesses is the Judge who hears the evidence; and therefore upon that Court, or upon some superior Court which has the power of looking into the proceedings, the law imposes the duty of sanctioning or refusing to sanction criminal proceedings against the parties or their witnesses.

But, if a case is settled without any evidence being gone into, it seems to me that the Court in which the suit was brought has no opportunity of judging of the *bona fides* of the claim or defence; and if it has any power at all under such circumstances, which I very much doubt, to give its sanction to criminal proceedings against either party, I think it would be guilty of a great impropriety and indiscretion in so doing.

In this particular case no evidence was gone into. The proceedings taken by the mortgagee in 1878 were instituted under Regulation XVII. of 1866, which does not make it necessary that his petition should even be verified in the ordinary way. The suit was subsequently compromised by consent, each party paying his own costs; and it seems to me that, as no evidence was given on either side, it was quite impossible for the Judge to form

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anything like a correct judgment as to whether the mortgage-money had or had not been paid when the proceedings were instituted in 1878.

Then there was another point taken by Mr. Ghose, which, I think upon consideration, is entitled to some weight.

The petition presented by the mortgagee in 1878 did not require (as we have already seen) to be verified upon oath or affirmation. The petitioner was, therefore, *not bound so to verify it*, although, in point of fact, he did so, and Mr. Ghose's contention is, that, unless the petitioner was legally bound to verify the petition, his verifying it gratuitously would not render him liable to conviction for giving false evidence, or making a false claim (*see* sections 191 and 193 of the Indian Penal Code).

An oath voluntarily taken in a proceeding where an oath is not necessary would not, by the English law, support an indictment for perjury, and I should doubt whether, under the Penal Code, a statement upon oath, where the oath is not necessary, would come within the provisions of section 191. But it is not necessary for our present purpose to decide that question.

The order of the District Judge which sanctions the criminal proceedings, will be set aside on the first ground.

MACLEAN, J. MACLEAN, J. :—

I concur in setting aside the proceedings on the ground that the Court of the Judge of Pubna and Bogra was not the Court before or against which the alleged offence was committed.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF CHANDRA KANT DE } PETITIONER. *Nov. 9th.*  
 SIRCAR . . . . . : . . . . . } . . . . . No. 268 of  
 1880.

*Penal Code (Act XLV. of 1860), section 188—Order in civil suit—Injunction,  
 Disobedience to—Civil Court, Disobedience to.*

Section 188 of Act XLV. of 1860 applies to orders made by public functionaries for public purposes, but not to an order made in a civil suit between party and party.

REFERENCE submitted for the opinion of the High Court under the following circumstances:—

Two zemindars occupied lands on the borders of an old tank to which tank the Sessions Judge had found that both parties had right to joint and undivided possession. On the 21st August 1879, in adjudicating in a suit between these two parties appealed from the Court of the Sub-Judge, the Sessions Judge, in passing the decree, wrote therein as follows: "I further add to the decree of the lower Court an injunction directing defendant (Gunga Kant Lahory, appellant) to refrain from excluding plaintiff (Farini Kant Lahory) from any portion of the Gunga Sagor" (this Gunga Sagor being an old tank, the subject of the litigation) "itself as joint sharer, and both parties from taking or giving to any other person exclusive possession of any portion thereof without the consent of the other."

On the same day, in another appeal in which Tarini Kant Lahory was appellant, the Judge gave him a decree, except for a

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SIRCAR.

Judgment.

very small portion of his claim, which was for certain plots of land adjoining this tank. In that appellate decree an injunction was included which directed the defendant (Gunga Kant Lahory) to refrain from excluding plaintiff as joint sharer, and both parties from taking or giving to any other person exclusive possession of either or any portion of the plots of land without the consent of the other.

Some time after this, the plaintiff appeared before the Judge, and applied for permission to prosecute Gunga Kant Lahory under section 188 of the Indian Penal Code for having disobeyed the injunction, alleging that the latter had, along with a considerable gathering of men, gone on to the land appertaining to the tank and included in the decree, and had erected a hut there.

This sanction was given by the Judge. The Magistrate, considering that section 188 of the Indian Penal Code did not apply to orders made in a civil suit, dealt with the case summarily under section 237 of the Civil Procedure Code, and acquitted the prisoner under section 211. The Sessions Judge considered that the acquittal was improper, and referred the matter to the High Court in order that it might be set aside.

The grounds on which the Judge suggested that the order was improper were the following :—

*First*, that the Magistrate was wrong in holding that section 188 of the Indian Penal Code did not apply to disobedience of an order promulgated by a Civil Court.

*Secondly*, that the Magistrate was wrong in holding that the order in question was not adequately promulgated.

• The judgment of the High Court (1) was as follows :—

In our opinion section 188 applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party; so we think the Magistrate was right in refusing to act under the section.

If the defendant in the suit has disobeyed the injunction, the Judge ought, on the application of the plaintiffs, to have sent him to jail for disobeying the Court's order. That was the proper remedy.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF UMA CHURN SANTRA

AND

BENI MADHUB ROY.

1880  
Sept. 22nd.

*Criminal Procedure Code (Act X. of 1872), sections 530 and 533—Breach of the peace, Probability of—Enquiry.*

There being no present danger of a breach of the peace, the fact, that such a breach is likely to take place at a future time, will not justify a Magistrate in making an order under section 530 of the Criminal Procedure Code.

The duty of making an inquiry under section 533 of the Criminal Procedure Code should be deputed to a Magistrate, not a canungoe.

REFERENCE under section 296 of the Criminal Procedure Code under the following circumstances :—

One of two parties, disputing the possession of certain lands at Kuran in the Ghatal Sub-division of the District of Midnapore, lodged a petition before the Deputy Magistrate, who, having found (in January 1880) that there was a likelihood of a breach, bound down the parties in their recognisances to keep the peace for one year. In February 1880, the same party applied for an order under section 530, whereupon the Deputy Magistrate deputed a canungoe to investigate the matter, who reported that the first party was in actual possession of the disputed lands; that no present apprehension of a breach of the peace existed; but that, in the absence of an order under section 530, a breach of the peace was likely to occur at a time when the cultivation of the disputed lands would be proceeded with.

On this, the Deputy Magistrate took proceedings under section 530, and finally directed the first party to retain possession.

The case was referred to the High Court by the Sessions Judge on the ground that the proceedings did not comply with section 530, nor disclose legal ground for instituting the proceedings.

Baboo Bama Churn Banerjee, for the Petitioner.

[CRIMINAL.]

C. L. R. 71.

1880

*In re*

UMA CHURN

SANTRA

v.

BENI

MADHUB

ROY.

*Judgment.*

The following judgment was delivered by the High Court (1):—

We think that the District Judge has taken a very proper view of this case. We have referred to the report, which was made by the canungoe, and upon the strength of which the Deputy Magistrate appears to have made his order; and it certainly does distinctly appear from that report that there was no present danger of a breach of the peace, although it suggests that probably at the time of cultivation, which would be some three or four months afterwards, there might be danger of that kind.

It is clear that, if there was no likelihood of a breach of the peace at the time when the order was made, the probability of a breach of the peace some three or four months later did not justify the Deputy Magistrate in making the order.

We think it right also to notice that the Deputy Magistrate appears to have directed a canungoe to institute the inquiry; and that the report upon which he acted was made by the canungoe. Now, if this was an inquiry under section 533 of the Criminal Procedure Code, he clearly ought to have deputed the duty of making it *to a Magistrate, and not to a canungoe.*

Upon the first ground, however, we think it clear that the proceedings must be set aside, as the Magistrate had no legal ground for making the order.

(1) GARTH, C. J., and MACLEAN, J.

## [CRIMINAL JURISDICTION.]

IN THE MAITER OF MUSSAMUT CHAMIA . . . APPELLANT.

1880  
Nov. 23<sup>rd</sup>.  
No. 684 of  
1880.*Penal Code (Act XLV. of 1860), section 494, Conviction under—Evidence—  
Custom—Marriage, Offences relating to.*

A conviction under section 494 of Indian Penal Code for marrying again during the lifetime of a husband or wife cannot be upheld where there is evidence to show that such marriages are not unusual among persons of the same caste as the accused, and it is not proved that such marriages are void.

**A**PPEAL from a conviction and sentence passed by the Officiating Sessions Judge of Monghyr under section 494 of the Indian Penal Code.

In this case the accused was charged with having married one Etwari during the lifetime of a former husband.

She admitted having married him, but, in defence, alleged that, in the caste to which she belonged (the Mehter caste) and other low castes, it was customary for women to leave their husbands at any time, and marry other men, and that she had, in this case, left her former husband before the second marriage, because he failed to provide her properly. In support of this allegation several witnesses were called. One of these witnesses spoke to the fact of his own wife having, during his absence in Calcutta, been hard pressed for money to support herself, and marrying another man, and of his having himself thereupon married another woman. Counter-evidence was given by the prosecution.

Upon the whole evidence, the Officiating Sessions Judge said : "All that can be held as proved is, that, if her first husband lets her go, a woman can marry another man, and the caste-people regard the marriage as valid, and also that cases occur in which, especially when neglected, a woman marries another man, and meets with no interference from her first husband."

He was of opinion, however, that her first husband had not let her go, nor had she been ill-treated, and found her guilty under section 494 of the Indian Penal Code, and sentenced her to six months' rigorous imprisonment.

1880

The prisoner appealed to the High Court.

*In re*  
MUSSAMUT  
CHAMIA.

The judgment of the High Court (1) was as follows :—

*Judgment.*  
—

The appellant in this case has been convicted under section 494 of the Indian Penal Code. In order to sustain a conviction under this section it must be proved—

(1) that the accused had a husband living ;

(2) that the accused married again during the life of such husband ; and

(3) that such second marriage is void by reason of its taking place during the life of such husband.

As to the first two points there is no doubt. The accused had a husband living, and she married again during his lifetime.

As to the third point, we are of opinion that it has not been proved that the second marriage is void by reason of its taking place during the lifetime of the first husband. On the contrary, there is evidence that such marriages are not uncommon amongst persons of the caste to which the appellant belongs, and actual instances have been given of such marriages having occurred.

We set aside the conviction, and direct the release of the appellant.

(1) GARTH, C. J., and FIELD, J.

## [CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF JUGGUN LALL . . . . . APPELLANT.

1880  
Nov. 17th.  
—  
No. 671 of  
1880.

*Evidence Act (I. of 1872), section 35—Official Public Book—Evidence of entry in Official Public Book—Entry in Official Public Book, Evidence of non-existence of—Indian Penal Code (Act XLV. of 1860), sections 192 and 466—Fabrication of false evidence—Forgery.*

Section 35 of the Evidence Act, which provides "that any entry in an official public book, which is duly made by a public servant in the execution of his duty, is of itself a relevant fact," does not make the public book evidence to show that a particular entry has not been made in it.

Section 466 of the Indian Penal Code is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer.

The accused, in order to save an estate from forfeiture, made a false entry of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate, and as to what estates the rents were in arrear, so that he might take steps to enforce payment, and was convicted by the Sessions Judge of an offence under section 465 of the Indian Penal Code.

*Held*, on appeal, that the accused ought properly to have been convicted under section 192 of the Code; the provisions of that section not being confined to false evidence to be used in judicial proceedings.

**A**PPEAL from a conviction and sentence under section 461 of the Indian Penal Code, passed by the Officiating Sessions Judge of Sarun, dated 8th September 1880.

The facts were as follow :—

The appellant, Juggun Lall, was a *taidnavis* employed by Girwardhari, a *tougnavis*, in the Sarun Collectorate, and this case is another remarkable instance of the consequences likely to follow from neglecting to enforce the Government orders which prohibit unauthorized persons from being used in public affairs to do the work for which Government servants are paid suffi-



1880

In re

JUGGUN  
LALL.

Statement.

cient salaries. Juggun Lall received from Girwardhari a salary of four rupees a month. It seemed impossible to suppose that, without other unauthorized means of adding to this inadequate salary, there would have been a sufficient inducement for Juggun Lall to continue, for a considerable number of years, in the employment of a toujnavis of the Sarun Collectorate.

The present charge is, that, in the account-book kept in the Collectorate, and which shows the amount of revenue actually paid in respect of each estate on the Government Touji, an entry was made showing that the sum of Rs. 3 had been paid on account of the revenue of estate Barhariya, Touji No. 1023. If this sum of Rs. 3 had not been credited in this account, the Barhariya estate would have been in arrear, and it would then have been the duty of the Collector of the district to bring the estate to sale in accordance with the provisions of the Revenue Sale Law.

The case set up for the prosecution is, that no such sum of Rs. 3 had been paid in, and that Juggun Lall made the entry of a payment of the sum of Rs. 3 in the account-book already mentioned with the object of inducing the Collector to believe that no arrears of Government revenue were due in respect of this estate, the consequence of this erroneous impression in the mind of the Collector being that he failed to perform a duty cast upon him by the law. That the entry in question is in the handwriting of Juggun Lall has been admitted by him; and the only real question in this appeal is, whether he made such entry through mistake or error, or with the motive above mentioned of inducing the Collector to believe what was not actually fact. His own allegation is that he made the entry at the instance of Girwardhari. At one time he said that Girwardhari verbally told him to make the entry; in his defence before the Sessions Judge he said that Girwardhari gave him a chitta or written list of items from which he made the entry of payment. But, of either of these contradictory statements, there was absolutely no evidence. One of the witnesses at least, examined for the prosecution, would have been cognizant of the practice of Girwardhari in this respect, if, as is asserted by the appellant, Girwardhari

was in the habit of directing him as to the entries to be made in the Treasury accounts. But no question was put to this witness upon this point in cross-examination.

1880

In re

JUGGUN

LALL.

Judgment.

Mr. C. Gregory and Baboo Lall Mohun Dass, for the Appellant.

The Legal Remembrancer (G. C. Kilby) appeared for the Crown.

The following judgments were delivered by the High Court (1):—

GARTH, C. J. :—

GARTH, C. J.

The discussion which has just taken place has satisfied me that it is not necessary for us to hear Mr. Kilby.

The only point in the case, as to which I had any doubt, was this—whether there was any proof to justify the conviction, that the entry in question had been improperly made by the prisoner, *without any challan or warrant for making it*.

Mr. Gregory's contention was that the books which were produced from the Treasurer's office were not evidence *per se* of the fact that no such challan had been produced to the prisoner.

Those books, no doubt, ought to contain entries of all the challans which passed through the office; and they contained no mention of any challan which would have justified the prisoner in making the entry.

Then Mr. Kilby contends that section 35 of the Evidence Act makes these books evidence *per se*. But, upon looking at the section, it appears to me that Mr. Gregory's contention is just. The books are not evidence *for the purpose of proving the absence in them of any particular entry*. The section (35) only provides that "any entry in an official public book, which is duly made by a public servant in the execution of his duty, is of itself a relevant fact;" but it does not make the public book evidence to show that a particular entry *has not been entered in it*.

It is a great pity that, in the Mofussil, the distinction is not more clearly understood between books or other documents which are evidence *per se* and those which may only be used in evidence for the purpose of refreshing the memory of a witness.

1880.

In re

JUGGUN

LALL.

Judgment.

GARTH, C. J.

A few questions in this case put to the witness who produced the books from the Treasurer's office would have obviated all difficulty.

We must then see what evidence there really was that the prisoner made the entry in question *without any challan to warrant it*.

According to the admitted course of business in the office, a challan would have been sent to the department in which the prisoner was employed, vouching the receipt of each sum of money received in the Treasurer's Department; without such a *challan*, the prisoner could have had no authority to enter the sum of Rs. 3 in the books; and the challan, after the sum had been entered, would, in the ordinary course, have been kept with the other challans in the office.

Now, at the trial, a witness was called from the office who states that he was desired to make strict search for any challan corresponding with the entry of Rs. 3 made by the prisoner, and that, upon making such a search, he found no such challan.

This, as it seems to me, was at least *prima-facie* proof that no such challan was in existence which would have justified the prisoner in making the entry.

But then the prisoner himself had ample opportunity, from the evidence produced by the prosecution, of ascertaining whether any sum of money had been paid into the Treasurer's office, or any challan given, corresponding with the sum mentioned in the entry; because, in the Treasurer's office, there are two books kept—one by the accountant, and the other by the treasurer; and, in both these books, every sum that is paid into the office, and the number of the challan which represents it, is regularly entered.

Now both these books were produced at the trial by the prosecution, and the prisoner's counsel had full opportunity of examining them, and asking the witnesses who kept these books on cross-examination any questions about them. If there had been any such challan as justified the prisoner in making the entry, nothing would have been easier than to trace it in the books. But we do not find that a single question was put to the witnesses by the prisoner's counsel with a view of ascertaining that fact.

But the prisoner might have done more. It was in aid of the zemindar of the estate, to which this sum of Rs. 3 was credited, that the entry in question was made; and, if the sum were really paid in, nothing could have been easier than for the prisoner to have called some one from the zemindar's office to prove the payment of that sum. So that, even if Mr. Gregory's ingenious suggestions were well founded, that the officials in the Treasurer's office had stolen the money, and not made any entry of it, it might, nevertheless, have been readily shown that these 3 rupees had been paid on that day by the owners of the particular estate.

I am, therefore, of opinion that there was sufficient proof to justify the conviction upon the ground that the prisoner made the false entry without any warrant for making it.

Then as to the other point, upon which we, in fact, admitted the appeal, namely, that the prisoner was employed by Girwardhari as a mere scribe or amanuensis, and that he made the entries which he was told to make at Girwardhari's dictation, I think, upon looking further into the case, that this supposition is not only improbable, but opposed to the weight of evidence.

The prisoner was no novice in the department; he had been there several years, and before Girwardhari himself came there. He knew how the business was conducted, and it is proved that he did the greater part of it himself. He had the means, moreover, if he had so pleased, of calling the persons who were employed in the same office with him, and who appear to have been present when the entry in question was made, to show that he was a mere scribe, and only put down what Girwardhari told him.

But he never attempted to prove anything of the sort. We have heard the evidence read, and, so far from assisting the prisoner in this respect, it seems to me to show that he was himself the acting man in the office.

Moreover, this is not a point which was overlooked in the Court below. It appears to have been thoroughly considered by the Judge, and, in my opinion, he has dealt very ably and sensibly with it in his judgment.

So far as the merits of the case are concerned, these are the only points to which I think it necessary to refer.

[CRIMINAL.]

C. L. R. 72

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 Judgment.  
 GARTH, C.J.

1880

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JUGGUN  
LALL

Judgment.

GARTH, C.J.

But my learned brother has observed, in the course of the argument, that the prisoner has been convicted under a section of the Penal Code which appears hardly applicable to a case of this kind; and I think, upon consideration, that his view is correct.

It seems to me that section 466 of the Indian Penal Code is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by a public officer. As, for instance, where a man forges a marriage-certificate duly issued by the officer who ought to have issued it.

Here, of course, the entry does not profess to be made by any other than the prisoner himself, whose duty it was to make it; and the offence is, that, being authorized to make proper entries, he has made this false one.

We think that the case is one provided for by section 192 of the Code, which enacts that "Whoever makes any false entry in any book on record, intending that such false entry may appear in a proceeding taken by law before a public servant as such, and that such false entry may cause any person, who in such proceeding is to form an opinion, to entertain an erroneous opinion upon it, is said to fabricate false evidence."

Now the entry in this case is made by the prisoner (as the servant of the public officer who pays him) for the purpose of informing the Collector as to the rents which have been paid into the Collectorate, and as to what estates the rent is in arrear, so that he may take proper steps to enforce the payment.

The prisoner is found to have made this false entry in the book in order to induce the Collector to believe that this rent of Rs. 3 had been paid by the owner of the estate to which it is credited, whereas, in fact, it had not been so paid; and the Court has found that this was fraudulently done in order to prevent a forfeiture of the estate to which the money was credited.

It has been contended by Mr. Gregory that the case does not come within the scope of section 192, because the proceeding

before the Collector is not a judicial one. But it is clear from section 193 that the provisions of section 192 are meant to apply to proceedings *other than judicial proceedings*; because, by that section, there is one punishment provided for fabricating false evidence in a judicial proceeding, and another and a more mitigated punishment for fabricating false evidence in other proceedings.

1880  
In re  
JUGGUN  
LALL.  
Judgment.  
GARTH, C.J.

We cannot doubt that these entries are made for the purpose of proceedings which have to be taken before the Collector with a view to enforcing payment of the revenue; and that this particular entry has been made by the prisoner for the purpose of misleading the Collector into the belief that the rent of Rs. 3 had been paid. We therefore think that the case falls within the scope of section 192.

The only point that remains to be decided is the question of punishment. I have already said that, under section 466, the Judge in the Court below did not think it necessary to sentence the prisoner to the extreme penalty that he might have awarded, and therefore, as we have now to sentence him under section 192, we think we ought not to inflict upon him the extreme penalty under that section. We, therefore, reduce the sentence to two, instead of three, years' rigorous imprisonment.

FIELD, J. :—

FIELD, J.

I concur in the judgment which has just been delivered by the very learned Chief Justice.

[The learned Judge then re-stated the facts, and continued as follows :—]

As a matter of probability, it might be expected that Juggun Lall would have made the entry after looking at the challans usually forwarded to the Revenue Department by the Treasury Department. The contention of the prosecution is that no sum of Rs. 3 had been paid in, and that, therefore, no challan for this sum had ever been forwarded. It has been urged before us to-day that the prosecution have not sufficiently proved the non-existence of such a challan. It appears to me that there is some evidence on the part of the prosecution which raises a *prima-facie* case that no such challan was received in the Revenue Department, though, at the same time, it would have been more satisfac-

1880

*In re*  
JUGGUN  
LALL.*Judgment.*

FIELD, J.

tory if the witnesses connected with the Treasury Department had been directly asked as to the payment of this sum of Rs. 3, and had in their evidence expressly negatived the fact of such payment having been made.

It is not suggested that, if these witnesses were again called and asked this question, their testimony would be in favour of the appellant: and the books of the Treasury Department have been produced. It was open to the appellant's pleaders to examine those books. There is no serious suggestion that any consideration of them would bring to light the existence of their payment. Under all these circumstances, I am satisfied that no such payment was made, and that, as a matter of fact, Juggun Lall was not acting either through mistake or error, nor did he make what must be taken to be false entry under the directions of Girwardhari.

It may be well to add further that, supposing this payment to have been made, the duplicate challan would be in the possession of the payer. It does not appear that any attempt was made on behalf of the appellant to show the existence, or effect the production, of this duplicate.

I concur in reducing the sentence for the reasons given by the learned Chief Justice.

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## [CRIMINAL JURISDICTION.]

IN THE MATTER OF RUSSICK LAL MULLICK . . PETITIONER, Nov. 17th.*Penal Code (Act XLV. of 1860), sections 182, 211—False charge—Summary  
procedure—Police-report.* No. 265 of  
1880.

Where a person has instituted a charge found to be false by the police, a Magistrate, except under exceptional circumstances, is not justified, merely on a perusal of a police-report which has found a charge made to be false, in prosecuting the person, by whom such charge was preferred, summarily under section 182 of the Penal Code, but should proceed under section 211.

When a charge is pronounced false by the police, no proceedings should be taken by a Magistrate, *suo motu* until a reasonable interval has shown that the complainant accepts the result of the investigation.

**M**OTION to set aside a conviction and sentence passed by the Assistant Commissioner of Gobindpore in Manbhoom under the following circumstances :—

The petitioner brought a charge of theft against certain persons, which the police reported to be false. On this the petitioner applied to the Assistant Commissioner of Gobindpore for further inquiry, and for the taking of evidence. Upon this the Assistant Commissioner, without allowing the petitioner an opportunity of substantiating the charge made by him, ordered the police to adduce evidence for the purpose of prosecuting the petitioner under section 182 of Act XLV. of 1860. The prosecution took place, and resulted in the petitioner being convicted and sentenced to two months' rigorous imprisonment.

Against this conviction, the petitioner has appealed to the High Court.

*Baboo Ashootosh Dhur*, for Petitioner.



1880

In re

RUSSICK

LAL

MULLICK.

Judgment.

The following judgment was delivered by the High Court (1) :—

In this case the petitioner has been convicted on summary trial for an offence under section 182 of the Penal Code. He ought to have been tried for an offence under section 211, in which case he could not have been tried summarily, and would have had a right of appeal. The former section applies to informations made to a public servant, the latter to false charges of an offence involving criminal proceedings.

The petitioner charged four persons with theft, and the police, after investigating the charge, pronounced it false. On receipt of the report on 6th August, the Assistant Commissioner ordered the petitioner to be prosecuted under section 182 of the Penal Code, simply upon perusal of the report. There may be cases in which such a course is justifiable; as for instance, when the police find that property said to have been stolen has not left the complainant's possession, or where a person said to have been wounded or killed is found to be unhurt; but to order a prosecution on a police-report is often very unfair to the complainant, who may be able, and may wish to prove, that the investigation has been imperfect or even improper.

The petitioner was summoned to answer the charge, and on the 10th August he petitioned the Assistant Commissioner to be allowed to substantiate his own complaint. The Assistant Commissioner then held a consultation with the mukhtars on both sides, and, on perusal of the police-diaries, &c., adhered to the opinion that the charge was false. Petitioner was then tried by the Assistant Commissioner, and, it is needless to say, was convicted. It seems to us that the Assistant Commissioner would have done better if he had transferred the case for trial to a Magistrate, who had not formed any opinion upon it, if there was one available. The petitioner cannot be said to have had a fair chance. He was precluded from giving his own evidence, and it would have been surprising if the witnesses whom he called for his defence had shaken the Assistant Commissioner's opinion already formed.

We think that, when a charge is pronounced false by the police, proceedings should not be taken by the Magistrate, *suo motu*,

until a reasonable interval has shown that the complainant accepts the result of the investigation, and takes no further steps. The petitioner's application of 10th August ought to have been treated as a complaint to the Assistant Commissioner, and the procedure laid down in sections 144, 147, followed. Even then it would be undesirable to dismiss the complaint, and proceed against the complainant without hearing the witnesses if he desired to call any. A complainant, who runs the risk of adding perjury to an offence under section 211, may well be warned against the consequences; but, on the other hand, a Magistrate may entirely fail to understand the rights of a case from the complainant's own account of it; and, without hearing the complainant's witnesses, it may be impossible to understand it properly.

1880  
*In re*  
 RUSSICK  
 LAL  
 MULICK.  
*Judgment.*

To act merely upon the report of the police, as the Magistrate has done in this instance, and upon the strength of that report to turn the tables upon the complainant, and to put him upon his defence for making a false charge, without hearing first what he and his witnesses have to say, is extremely unfair. It is virtually allowing the police to reverse the whole course of the proceedings, and after such an inquiry, as they (the police) may have thought proper to make to shut the complainant's mouth, and place him in the position of an accused person, without giving him an opportunity of making good his charge.

We, therefore, consider that in this instance the conviction is improper, and must be set aside; and we direct the immediate discharge of the petitioner.

## [CRIMINAL JURISDICTION.]

1880  
July 20th. IN THE MATTER OF NOOR BUX KAZI, } ... APPELLANTS.  
SHAikh TOYAB, AND JAMIR MUNDLE }

Nos. 39 and  
362 of 1880. *Cross-examination of witnesses by Court—Evidence Act (I. of 1872), sections 138 and 165.*

*Per curiam.*—It was not intended that, under section 165 of the Evidence Act, a Judge should have power to cross-examine the witnesses for the prosecution; and as a general rule witnesses should be left by the Court to the pleaders to be dealt with as laid down in section 138 of the Act, it not being the province of the Court to examine witnesses unless the pleaders on either side have omitted to put some material question or questions.

**A**PPEALS from convictions and sentences of death passed by the Sessions Judge of Mymensingh upon the appellants for the murder of one Kohin Sircar.

It appeared that the deceased Kohin Sircar was killed in a riot on the morning of 1st February last, his death being caused by a spear being thrust into, and nearly through, his body. He also received a severe injury on his head, and a slight one in the region of his shoulder.

Noor Bux Kazi, in the judgment of the Sessions Court, was proved to have been one of four persons, who, being members of an unlawful assembly, directly incited certain armed members of that assembly to attack and kill Kohin.

Jamir Mundle and Shaikh Toyab were found to have joined in the attack.

The Sessions Judge found all three prisoners guilty of murder under the provisions of sections 114 and 149, read with section 302, of the Penal Code, and passed sentence of death upon them.

The High Court, upon a careful examination of the evidence, discharged Noor Bux Kazi, and convicted the other two prisoners of rioting only, under section 148, and sentenced them to rigorous imprisonment for three years.

It appeared on the examination of the evidence in the case that the Sessions Judge had himself questioned most of the witnesses at great length on their examination-in-chief being completed, and before an opportunity had been afforded to the pleader on the other side of subjecting the witnesses to cross-examination in the usual course.

1880  
In re  
NOOR BUZ  
KAZI, SHAIKH  
TOYAB,  
and  
JAMIR  
MUNDLE.

Judgment.

*Jackson* and *Moonshēe Serajul Islam*, for the Appellants.

As to this latter point, the High Court (1) in their judgment expressed itself as follows:—

We think it right to point out to the Sessions Judge that the course which he adopted in the examination of witnesses for the prosecution was irregular, opposed to the provisions of section 138 of the Evidence Act, and not quite fair to the prisoners.

We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoners' pleaders to a great extent ineffective, by assisting the witnesses to explain away in anticipation the points which might have afforded proper ground for useful cross-examination.

It is not the province of the Court to examine the witnesses unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in section 138 of the Act. The Judge's power to put questions under section 15 is certainly not intended to be used in the manner which we have had occasion to notice in the present case.

(1) GARTH, C. J., and MACLEAN, J.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF OKHOY KUMAR. . . . PETITIONER.

*Criminal Procedure Code (Act X. of 1872), sections 339, 340—Evidence not understood by witnesses—Admission to bail—Sentence to commence at future date—Bail, Prisoners admitted to, pending appeal.*

Section 339 of Act. X. of 1872, being for the protection of witnesses only, the fact that witnesses did not understand their depositions when read over, although they may not have required them at the time to be interpreted, affords no ground for an application by the accused to set aside a conviction.

Where a Magistrate, after sentencing two prisoners to separate terms of imprisonment, admitted them to bail, in order that they might have the means of appealing, *held* that such admission to bail did not make the previous sentence one to commence at a future time, and consequently illegal.

The case of *Kishen Soonder Bhuttacharjee*, 12 W. R., Cr., 47, distinguished.

**A**PPPLICATION to set aside a conviction and sentence passed by the Judicial Commissioner of Chota Nagpore.

Baboo *Guru Dass Banerjee*, for Petitioner.

The facts of the case sufficiently appear from the judgment of the High Court (1), which was as follows:—

This is an application to set aside a conviction on two grounds:—

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~~~~~  
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The first is, that at the trial the evidence was taken down in a language other than that which the witnesses understood; and, although none of the witnesses appear to have required that the evidence should be interpreted to them in their own language, it is argued that, as they did not understand it when it was read by the officer of the Court, the conviction is bad.

We think that there is nothing in this objection. The application now made is *on behalf of the accused*; and the provisions which relate to the evidence being read in a language understood by the accused are contained in section 340, where it is enacted that, when the evidence is given in a language not understood by the accused, it should be interpreted to him in open Court in a language which he does understand.

Section 339, to which we have been referred, is for the protection of *witnesses*. It provides that a witness (in order to satisfy himself that the evidence which has been taken down is correct) may have it interpreted to him, if he desires it, in a language which he understands. But here no question of that kind is raised. It is the accused who is making this application. The evidence was read over in English, and it appears that one of the prisoners understands English, and that the pleader for the prisoners, who was in Court, understands English perfectly. There is, therefore, no ground for this objection.

The second point is, that the sentence passed upon the prisoners is an illegal one, because, at the time when it was pronounced, they were admitted to bail for the purpose of enabling them to appeal; and we are referred to a case, which was decided by Sir BARNES PEACOCK and the late Mr. Justice DWARKA NATH MITTER—*Kishen Soonder Bhuttacharjee*, 12 W. R., Cr., 47—which is said to be in point as showing that this objection is valid.

But that was a totally different case. What the Magistrate did there was to sentence the prisoners to a term of imprison-

(1) GARTH, C.F., and MACLEAN, J.

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KUMAR.

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ment, which was to commence, not from the time when the sentence was pronounced, but from some future time, in order to enable the prisoners to appeal in the meanwhile; and it was held by the learned Judges (with reference especially to section 421 of the old Code of Criminal Procedure, Act XXV. of 1861) that the Magistrate had no right to pass such a sentence; that is, he had no right to sentence a man, even on his own request, to a term of imprisonment which was to commence at a future date.

But that was not the case here. The term of imprisonment (which was one year in the case of one prisoner, and six months in the case of the other) was to commence, and did in fact commence, from the time when the sentence was passed; and all that the Magistrate did was to admit the prisoners to bail (upon their own application) in order that they might have the means of appealing to the Judicial Commissioner. It was not a sentence to commence at any future time. It commenced at the proper period; and it was during that period that the prisoners were allowed to go on bail.

We are clearly of opinion that the sentence itself was not illegal, and that the application must be refused.

[CRIMINAL REFERENCE.]

IN THE MATTER OF SUNKER GOPE.

Sept. 17th.

Penal Code (Act XLV. of 1860), section 411—British territory, Stolen property brought into—Jurisdiction.

Where the accused committed a theft outside British territory, and brought the stolen property into British territory, it was *held* that he was rightly convicted of an offence under section 411 of the Penal Code.

REFERENCE submitted by the Officiating Magistrate of Durbangah under section 296 of the Criminal Procedure Code.

The terms of the reference were as follow :—

“The facts are, as admitted by the prisoner, that he stole two heads of cattle from the houses of two separate people in Nepal, and brought the cattle into British territory. Here they were arrested and sentenced, by the Officiating Joint Magistrate of Madhubani, Mr. Grierson, to one year's rigorous imprisonment on the 19th June 1880. The complainant and accused are both subjects of Nepal, and the theft was committed in Nepal. The only concern we had with the case was that the accused brought the stolen property into British territory. Under these circumstances I believe the case was not cognizable here, and the sentence passed by Mr. Grierson is bad.”

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In re
SUNKER
GOPE.
—
Judgment.
—

The judgment of the High Court (1) upon the Reference was as follows:—

We are of opinion that the conviction of Sunker Gope for an offence under section 411 of the Penal Code is legal, and that we should not interfere. Sunker Gope confessed to having stolen cattle in the kingdom of Nepal, and he was found in possession of them in British territory. Section 66 of the Criminal Procedure Code, *Illustration (b)*, lays down that "a charge of receiving or retaining stolen goods may be inquired into and tried, either in the district in which the goods were stolen, or in any district in which any of them were at any time dishonestly received or retained."

Now, the theft having occurred beyond British territory, the prisoner could not be tried for that offence in our Courts (*see* Indian Law Reports, 1 Madras, p. 171), but the present case seems to be very similar to one reported in Indian Law Reports, 1 Bombay, p. 50, and we therefore think that the conviction may be sustained.

It is unnecessary for us to say anything on the question of extradition; that matter will be dealt with by the local authorities under the orders of Government.

* (1) GARTH, C.F., and MACLEAN, J.

[CRIMINAL JURISDICTION.]

EMPRESS

Dec. 9th.

No. 1306

AND

KARIMDAD

*Penal Code (Act XLV. of 1860), section 211—Police reports—False charge
—Procedure.*

A man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him, and such opportunity should be afforded him not before the police, but before the Magistrate.

REFERENCES submitted under section 296 of the Criminal Procedure Code (Act X. of 1872) for the orders of the High Court.

The circumstances under which the reference was made were as follow :—

One Karimdad laid a complaint before the head constable in

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charge of Kutubdin outpost on 26th July 1880 against Baboo Doorga Churn Ghose, a Government Officer in charge of Settlement and Khas work in that island, and against his peon, under sections 342, &c., of the Penal Code.

The police inquired into the case, and reported, in form C, to the effect that the charge was false, and that there was no ground for it. The police made no arrest.

On the 20th August, the Deputy Magistrate in charge of the Sub-division recorded his order on the police-report, stating that the charge made by Karimdad was false, and recommending that Karimdad should be prosecuted under section 211 of the Penal Code.

The Magistrate had, in the meantime, sent a summons to Karimdad to come and give his statement at head-quarters before one of the Deputy Magistrates. He, however, never came.

On the 31st August, accordingly, the Magistrate gave his sanction to a charge being instituted against Karimdad under sections 211 and 182 of the Penal Code, and directed the Sub-divisional Officer to hear the case under those sections.

The Sub-divisional Officer did so, and on the 21st September, which was the date fixed for hearing, the parties and witnesses were in attendance as appeared from the formal report of the Court Officer.

The Sub-divisional Officer did not go into the case, but passed the following orders:—

“As, without first hearing the case in which Karimdad is the complainant, a case under section 211 of the Indian Penal Code cannot proceed, it is therefore ordered that the police be directed to send up witnesses, and Golock Sing, peon, the accused in the case in which Karimdad is the complainant, and that the case be fixed for the 30th of September. The witnesses present to appear on that day. Dated 21st September 1880.

“The case being brought up to-day, it appears that the peons are not present. Karimdad only is present with his own witnesses. It is therefore ordered that a letter be addressed to the District Magistrate on the subject, and the case postponed until a reply is received. Dated 30th September 1880.”

The Officiating Magistrate was of opinion that the Divisional

Officer have acted illegally, and submitted that the orders passed by him should be quashed for the following reasons, as stated by him:—

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“The police-report in form C was a report made in accordance with section 125 of the Code of Criminal Procedure; it alleged that there was no just ground for arresting the persons whom Karimdad accused; no person was arrested accordingly, and there was no case.

“The Magistrate passing orders according to law on that report decided that Karimdad had himself committed an offence under sections 211 and 182 of the Penal Code, and Karimdad was accordingly arrested, and witnesses appeared against him. The Deputy Magistrate’s order illegally quashes this case without hearing the witnesses in attendance, and further illegally orders that one of the persons accused by Karimdad should be arrested and put on trial, although the police and the Deputy Magistrate himself also had fully satisfied themselves that Karimdad’s complaint was false, and that there was no just ground for arresting the persons accused by him.

“A Magistrate, by sections 146-7, is forbidden to issue processes for arrest of any person when he is satisfied that there is no ground for proceeding against him.

“And when a man is in custody for an offence under sections 211 and 182 of the Penal Code, the Magistrate having jurisdiction *must* try him under the Chapter of the Code relating to trial of warrant-cases exactly as he must dispose of any warrant-case whatever in which the parties are present.”

The order of the High Court (1) upon the reference was as follows:—

We are unable to see that the orders passed by the Deputy Magistrate in this case are irregular or illegal. Whatever opinion may have been formed by the Magistrate upon the police-report as to the truth of Karimdad’s complaint, when he appeared with his witnesses, and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him on his trial under section 211

(1) GARTH, C.F., and FIELD, J.

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of the Penal Code. It is manifest justice that a man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him; and such opportunity should be afforded him, if he desires to take advantage of it, not before the police, but before the Magistrate. If persons are to be prosecuted under section 211 of the Penal Code upon the mere report of a police-officer that their complaints are not true, the police are made the Judges whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by the law, and it requires but little experience of this country to understand how dangerous it would be to the best interests of justice. Magistrates of all grades cannot understand too clearly that, while the police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of the evidence when collected.

We decline to interfere.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF BHOLA NATH GHOSE . . PETITIONER ;

AND

MOTHOOR MUNDLE. .

1820
Sept 29th.No. 153 of
1820.

Criminal Procedure Code (Act X. of 1872), section 530—Possession under decree of Civil Court—Magistrate, Duty of, as to enforcement of decree of Civil Court—Jurisdiction of Magistrate.

Where a decree has been passed by a Civil Court determining the rights of the parties to a suit to disputed land, it is a Magistrate's duty to uphold that decree, and he cannot, as between such parties proceed under section 530 of the Code of Criminal Procedure to decide afresh upon the question of possession. *Roy Mohun Roy vs. Wise*, 16 W. R. 24 ; and *Raneegunge Coal Association vs. Hem Lall Ghatwal*, 24 W. R. 17, followed.

REFERENCE under section 296 of the Criminal Procedure Code submitted by the District Judge of Beerbhoom.

Baboo *Troylukho Nath Mitter*, for the Petitioner.

The facts and circumstances of the case will be found sufficiently stated in the following judgment of the High Court (1), which was delivered by

GARTH, C. J. :—

GARTH, C. J.

This is an application to aside the order of a Magistrate, made under section 530 of the Criminal Procedure Code ; and the facts appear to be these :—

I should premise that we are only asked to set aside the order, so far as it relates to a jote of 13 beegahs of land, the tenant of which, Mothoor Mundle, had failed to pay his rent ; and the consequence was, that his landlord brought a suit, and obtained a decree against him on the 28th March 1879.

By the terms of that decree the defendant had two months given him to pay the rent, and, if he did not pay it within that time, the landlord had a right to eject him.

The rent not having been paid, the landlord applied for and

(1) GARTH, C. J., and MACLEAN, J.

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GARTH, C.J.

obtained possession of the land by the usual process* under section 263 of the Civil Procedure Code.

The Magistrate seems to be under the impression that what is called *symbolical possession* was given to the landlord; but this is a mistake. Symbolical possession is given under section 264, and is only applicable to cases where the party entitled to execution does not obtain actual possession of the land, but only the right to receive the rent of it. Here, under section 263, the landlord obtained *actual possession*; and from that time the possession of the tenant was at an end.

Possession having thus been obtained by the landlord on the 27th of August, the tenant, it appears, on the following day, made an application to the Moonsiff's Court that the execution should be set aside on the ground that he was willing to pay the rent due; but, as the rent had not been paid in due course, the Moonsiff refused the application.

Notwithstanding this, the tenant persisted in attempting to regain possession of the land; and consequently, on the 16th of September, an application was made by the landlord to the District Magistrate to protect his rights, and to take steps to prevent his possession being thus disturbed.

Upon this application the Magistrate seems to have done nothing; but it appears that, on the 2nd of October (if not before that time), he ascertained that the tenant had applied to the Moonsiff to be restored to possession, but had been refused.

* He was, therefore, at that time thoroughly apprised of the real state of the case; and, if he had only acted with firmness, and taken steps to prevent the tenant from forcibly attempting to regain possession, he might have prevented a great deal of mischief. Instead of this, although an order was made about this time upon Mothoor Mundle, calling upon him to show cause why he should not give security to keep the peace, the Magistrate, for some unexplained reason, discharged this order, and the tenant was left at liberty to persist in his illegal proceedings.

This unhappy state of things continued all through the cold weather, and the Magistrate, after a long delay, appears to have supposed that his duty was to take proceedings under section 530 of the Criminal Procedure Code.

Accordingly, in January last, an enquiry was held under that section, and, on the 5th of February, the Magistrate made an order awarding possession to the tenant.

Thus the latter was directly rewarded by the Magistrate for persistently disregarding the process and authority of the Civil Court.

The landlord then certainly seems to have waited some time before going to the District Judge to complain; but, considering what his experience of the law had been, he might well be uncertain as to where to go next with any hope of redress.

The District Judge has now sent the proceedings to the Court under section 296 of the Criminal Procedure Code, with a view to having the legality of the order considered; and having heard the case argued, we have no hesitation whatever in setting aside the order, so far as it relates to the 13 beegahs.

This case certainly illustrates, in a very remarkable way, how grievously the powers given to Magistrates by section 530 may be misapplied, and how useless it is for suitors in this country to establish and enforce their rights in the Civil Courts unless the Magistracy will lend their aid with vigour and good will to protect those rights when they are once established.

Section 530 is intended as a means of preventing quarrels between rival claimants of property until their claims have been decided in a Civil Court.

But in this case the landlord had already *not only established, but enforced, his right in the Civil Court*. He had been placed in possession of the 13 beegahs of land by the only process which the law provides for that purpose.

The effect of the execution under section 263 of the Civil Procedure Code was to place him in actual possession of the land, and to turn the tenant out of it; and any attempt by the latter to repossess himself of the property was nothing more or less than a trespass.

The tenant applied to the Civil Court on the 28th of August to restore him to possession, but was refused; and, notwithstanding this, he still persisted in forcibly attempting to regain possession.

On the 16th of September, within three weeks of the execution,

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the landlord applied to the Magistrate to protect his rights. This was all he could do, unless he had taken the law into his own hands, and turned the tenant out by main force. But the Magistrate does nothing. He informs himself of what has taken place. He knows that the landlord has been placed in possession, and that the tenant has tried in vain to be restored; and yet he does nothing.

If he had only informed the tenant when the parties were before him that he had no right to trespass upon the land, which the Civil Court had awarded to his landlord, and had made him give security to keep the peace, a long succession of quarrels would have been avoided. A ryot often errs on these occasions through ignorance, and not correctly understanding his true position; and a few words of wholesome explanation from the Magistrate might have prevented any further misapprehension and mischief.

But the course which the Magistrate took in this instance naturally emboldened the tenant to persist in the trespass, and in defying the authority of the Civil Court; and the fact of this trespass being eventually sanctioned by the Magistrate with full knowledge of the circumstances, was of course likely not only to lead to a repetition of the quarrel in this particular case, but to operate as a very bad example to the neighbourhood.

The Magistrate, with the knowledge that he possessed, had no more right to make the order which he did on the 5th of February 1880 than he had to make it on the 1st of October 1879, the day after the landlord had been put into possession.

The order must now be set aside; and, if the Magistrate does his duty, he will take steps to secure to the landlord, without molestation or delay, the possession which the Civil Court has given him.

The tenant of course may be a loser of any crops which are now growing on the land, but this will be entirely owing to his determined resistance to the authority of the Civil Court, encouraged unhappily by a want of vigorous action on the part of the Magistrate.

The Magistrate (from his letter to the District Judge) would seem to be under some misapprehension with regard to the law upon this subject.

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He seems to imagine that, when a party to a suit is placed in possession of land by the Civil Court, unless he at once begins to cultivate, or to exercise some acts of ownership over it, he must be taken, after a reasonable time, to have relinquished his rights; and that, if the other party, against whom he has recovered his decree, re-enters upon the land under such circumstances, and a quarrel consequently ensues, a Magistrate has a right to proceed, under section 530, to try the question of possession between the parties without regard to the decree and execution of the Civil Court.

If this were the law, it is difficult to see how the right to land could ever be finally determined. It is clear that the Magistrate is quite in error; and, if authority were required to show that he is so, the cases referred to by the District Judge are directly in point—*Roy Mohun Roy vs. Wise*, 16 W. R. 24, and the *Raneegunge Coal Association vs. Hem Lall Ghatwal*, 24 W. R. 17. In both these cases it is clearly laid down that, when a Civil Court decree has once been passed, determining the rights of parties to disputed land, it is a Magistrate's duty to uphold that decree, and he cannot (as between those parties) proceed under section 530 to decide afresh upon the question of possession.

Another ground suggested by the Magistrate, why his order should not be interfered with, is, that the landlord has not applied earlier to set it aside; but there is no positive rule of limitation in cases of revision. It is true that, in the exercise of their discretion, Judges of this Court have very generally refused to interfere if the applicant has not come to the Court within the time allowed for an appeal when the merits of the case are doubtful, or where no injustice is likely to arise from the Magistrate's order.

But, in a case of this kind, where very palpable injustice has been done to the applicant, where the Magistrate has wholly disregarded the decree of the Civil Court determining the rights of the parties, and where the effect of the Magistrate's order,

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f it were to stand, would be vexatiously to oblige the landlord to bring another suit to obtain the self-same possession which he has already obtained in the former suit a year ago, I should never hesitate, even after a longer delay than has occurred here, to give the applicant the relief to which he is so clearly and justly entitled.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF RAM REWAZ KOOWAR. . APPELLANT.

*Penal Code (Act XLV. of 1860), sections 193, 199, 471, 467—Forgery—False deposition.*1880
Oct. 22nd.
No. 575 of
1880.

A petition not bearing the signature of the accused, and therefore not a declaration made or subscribed by him, cannot be made the foundation of a charge or conviction under section 199 of the Indian Penal Code, but a deposition on oath supporting such a petition, if false, justifies a charge under section 193 of the Code.

APPEAL from a conviction and sentence under sections 199, 467, and 471 of the Indian Penal Code.

The facts and circumstances of the case appear in the judgment of the High Court (1), which was as follows:—

The prisoner brought a suit on a bond against the complainant. It was filed on 3rd September 1879, and, on 6th October, complainant filed his answer denying the execution of the bond. Four days later, the prisoner's pleader filed a petition on his behalf, asking that the suit might be struck off, as the claim had been compromised for Rs. 18.

The charges are forgery of the bond, and making a false statement to the Court. The Judge and Assessors find the accused guilty of both these charges.

The case is entirely one of credibility of evidence, and does not seem to be one in which we can say that the Court below ought to have taken another view of the evidence, and believed the prisoner and his evidence in preference to the complainant and his.

Taking it as found that the bond was forged to the prisoner's knowledge, he is, by virtue of section 471, punishable under section 467.

The petition on which the conviction under section 199 is founded does not seem to bear prisoner's signature (*see* page

(1) GARTH, C. J., and MACLEAN, J.

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KOOWAR.*Judgment.*

28 of record). But it contains on the reverse the record of his deposition on oath attested by the Moonsiff.

We think that this document cannot be made the foundation of a charge and conviction under section 199 of the Penal Code, as it is not a declaration made and subscribed by the prisoner, or one which a Court of Justice is bound or authorized by law to receive as evidence of any fact. But the deposition on oath by which the document was supported justifies a charge of perjury, and, as that deposition is proved to be false, we think that the prisoner should have been convicted under section 193 of the Penal Code.

We, therefore, substitute, for the conviction and sentence under section 199, a conviction and similar sentence under section 193, and affirm the conviction and sentence under sections 467 and 471.

[ORIGINAL CRIMINAL JURISDICTION.]

EMPRESS PLAINTIFF ;

1881
Jan. 29th.

AND

DABEE PERSHAD DEFENDANT.

*Evidence Act (I. of 1872), sections 21, 25, and 26—Admission made by
accused to police-officer before arrest.*

An admission, not being a confession of guilt, made by an accused person to a police-officer before arrest, is admissible in evidence.

IN the course of this trial, Kisto Chunder Banerjee, a police-inspector, and a witness on behalf of the Crown, was asked by Mr. Phillips (Standing Counsel) to state what the accused had stated to him on a particular occasion regarding which the witness had already spoken, the accused not being under arrest.

Sale, for the accused, objected to the question on the ground that the accused at the time was actually under arrest.

Upon this point Mr. Sale was allowed to cross-examine the witness, and the Court decided upon the evidence that the accused was not at the time under arrest. Mr. Phillips thereupon repeated the question.

Sale again objected; he urged that it was immaterial whether

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the accused was under arrest or not. *In the Matter of Hiran Miya*, 1 C. L. R. 21, showed that no statement or admission of any kind, made by an accused person to a police-officer could be given in evidence. The prohibition contained in section 25 of the Evidence Act applied to cases in which the accused might be under arrest or not, while section 26 dealt only with cases where the accused was in custody. Section 25 says, "no confession" (not "no confession by an accused person") "to a police-officer shall be proved against an accused person." The section is wide in its terms, and draws no distinction between admission and confession—See *In the Matter of Hiran Miya*, 1 C. L. R. 21. Section 25 must be construed in its widest and most literal sense. See *Reg. vs. Hurribole Chunder Ghose*, I. L. R., 1 Cal. 207; nor was it restricted by section 21. The word "confession" was not defined in the Evidence Act, while "admission" was. It may, therefore, be inferred that no distinction was intended to be drawn between them, and that the words were intended to be synonymous for the purposes of the Act. See section 121 of the Criminal Procedure Code (Act X. of 1872), which was passed almost simultaneously with the Evidence Act. There "confession" embraced confession, admission, and confession of guilt.—See also *Empress vs. Rama Birapa*, I. L. R., 3 Bom. 12; *Reg. vs. Jora Hasji*, 11 Bom. H. C. R. 242. The only decision against my contention is that of PHEAR, J., in *Reg. vs. Macdonald*, 10 B. L. R. (Appendix) 2, but that decision was not arrived at after argument at the bar. The report of the case was most meagre.

PRINSEP, J. PRINSEP, J.:—

The question may be put. I agree in the opinion expressed by PHEAR, J., in *Reg. vs. Macdonald*, 10 B. L. R. (Appendix) 2, that the Evidence Act draws a distinction between an admission and a confession of guilt. The other cases quoted are not altogether in point.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF KALI PROSUNNA GHOSE ... PETITIONER.

1881
Jan 19th.
No. 306 of
1880.*Penal Code (Act XLV. of 1860), sections 187, 188—Regulation XX. of 1817,
section 21.*•
•

An omission or neglect by a zemindar, when called upon under section 21 of Regulation XX. of 1817, to nominate some one to fill the office of village watchman which had become vacant, is not an offence under either section 187 or section 188 of the Indian Penal Code.

MOTION to set aside a conviction and sentence passed by the Deputy Commissioner of Manbhdóm under section 187 of the Indian Penal Code.

The petitioner in this case, who was a zemindar, was, on the 2nd day of September 1880, convicted by the Deputy

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Magistrate of Purulia, under section 188 of the Indian Penal Code, and sentenced to pay a fine of Rs. 8.

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GHOSE.

Judgment.
—

On appeal, the Deputy Commissioner of Manbhoom, on the 7th day of October 1880, altered the conviction to one under section 187 of the Indian Penal Code, and enhanced the fine to Rs. 50.

It appeared that the office of village watchman had become vacant, and that the petitioner had been called upon to nominate some one to fill the office under section 21 of Regulation XX. of 1817.

The High Court was now asked to set aside the conviction on the ground that the facts disclosed did not constitute an offence, either under section 187 or section 188 of the Indian Penal Code.

Baboo Kali Churn Banerjee, for the Petitioner.

The judgment of the High Court (1) was as follows:—

The petitioner, a landholder, who was bound under section 21 of Reg. XX. of 1817 to nominate some person to act as village watchman, the former watchman having either died or been dismissed, neglected to do so, although a *purwannah* was issued to his agent reminding him of this duty. These facts being proved, the Deputy Magistrate of Purulia convicted him under section 188 of the Penal Code, and fined him Rs. 8. On appeal the Deputy Commissioner of Manbhoom, being of opinion that the conviction should have been under section 187 of the Indian Penal Code, altered it accordingly, but enhanced the amount of the fine to Rs. 50.

We agree with the Deputy Commissioner that the facts proved do not constitute any offence under section 188 of the Penal Code. But we are unable to agree with him that the conviction should be under section 187 of the Penal Code. That section applies to direct refusal or omission of a person bound by law to render or furnish assistance to a public servant to do so. The neglect to nominate a watchman under the circumstances set forth above does not, in our opinion, come within the purview of the section. We therefore set aside the conviction, and direct that the fines, if realized, be refunded to the petitioner.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF JANOKINATH GUPTA . . . PETITIONER.

1881
Jan. 27th.*Act V. of 1861, section 29.*No. 9 of
1881.

A constable cannot be convicted under section 29 of Act V. of 1861 for having failed to join his appointment on the expiration of his leave.

MOTION to set aside a conviction and sentence passed by the Magistrate of Howrah.

The circumstances of the case appear from the judgment of the High Court (1), which was as follows:—

The petitioner (a constable) obtained a month's leave, but failed to join his post on the expiration of that time. For this omission on his part, he has been committed under section 29 of Act V. of 1861, and sentenced to two months' rigorous imprisonment.

We think the conviction is bad, because his failure to resume his duty on the expiration of the leave does not, in our opinion, constitute an offence under the aforesaid section.

The conviction is therefore set aside.

(1) MITTER and MACLEAN, JJ.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF DEELA MAHTON.

1881
Feb. 28th.
—
No. 50 of
1881.

*Criminal Procedure Code (Act X. of 1872), section 359—Refusal
to summon witnesses—Evidence.*

In a prosecution, the case on both sides having been closed, the Magistrate issued a summons to a witness to give evidence, whereupon the accused filed a petition, praying to have certain witnesses summoned to give evidence to rebut that of the witness called by the Magistrate. The petition was refused.

Held that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused except on the grounds specified in section 359 of the Code of Criminal Procedure; and that the fact, that the accused had, at the close of his case, stated that he did not wish to call the witnesses whom he now tendered, was no reason for refusing to summon them to meet fresh evidence taken by the Magistrate.

MOTION to set aside a conviction and sentence passed by the Deputy Magistrate of Barh, on the 22nd of November 1880, under section 323 of the Indian Penal Code.

The grounds upon which revision of the sentence in question was sought were the following:—

After the witnesses of both parties in the case had been examined, the argument concluded, and the case closed on the 12th November, the Deputy Magistrate summoned the head constable to give evidence on the 22nd November.

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On the 13th November, the day after the summons issued the accused put in a petition objecting to the head constable being called as a witness for the prosecution at that stage of the case, and praying that certain witnesses whom he (the accused) had summoned, and who had appeared on the 17th November, but whom he had not examined, owing to the apparent weakness of the case for the prosecution, might be re-summoned and examined, so that he might have an opportunity of meeting the statements made by the head constable.

The Deputy Magistrate rejected this petition, and the accused alleged that by such rejection he had been materially injured.

Mr. *R. E. Twidale*, for the Petitioner.

The judgment of the High Court (1) was as follows :—

We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused except on the grounds specified in section 359 of the Code of Criminal Procedure; and that, if he did refuse on those grounds, he ought to have proceeded under that section. The fact, that the accused stated that he did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must accordingly direct that the proceedings be recommenced from that stage, and that the Magistrate do either take the evidence, or record his reasons for not doing so, and proceed as directed by law.

(1) CUNNINGHAM and PRINSEP, JJ.

[CRIMINAL REFERENCE.]

IN THE MATTER OF NAKI HAZI.

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Feb 25th.
—
No. 8 of
1881.

Recognizance—Criminal Procedure Code (Act X. of 1872), section 489—Penalty under recognizance-bond, Remission of.

Where the penalty under a recognizance-bond has been forfeited, neither the Magistrate nor the High Court has power to reduce the amount of the penalty.

REFERENCE under section 206 of Act X. of 1872 submitted for the opinion of the High Court by the Sessions Judge of Sylhet under the following circumstances:—

The applicant, Naki Hazi, was, on 2nd September last, in an assault case, bound over in a recognizance for Rs. 100 to keep the peace for six months, under section 489, Code of Criminal Procedure, and on the next day he threatened to assault and kick a peon of the Court of the Assistant Commissioner while he was turning him and others out of the verandah under orders of the Court. For this he was convicted and sentenced to a week's rigorous imprisonment under section 353, Indian Penal Code, and was called upon to show cause why the recognizance should not be forfeited. He failed to show cause, and the Assistant Commissioner ordered the bond to be forfeited under section 502 of the Code of Criminal Procedure. The amount has since been realized and credited to the Treasury.

The applicant applied to the Sessions Court for revision, and it appeared to that Court that the forfeiture of the entire amount, viz., Rs. 100, was too severe, and that the penalty ought to be reduced from Rs. 100 to Rs. 5, as the matter was one in which a person being suddenly pushed might make use of a threat which he would never actually carry out.

The following opinion upon the reference was given by the High Court (1):—

Neither the Magistrate nor the High Court has power to reduce the amount of the penalty entered in a recognizance-bond—*Nilmadhub Ghosal*, 19 W. R., Cr., 1; *Empress vs. Nurul Huq*, 1. L. R., 3 Cal. 757. The Sessions Judge, if he thinks proper, should refer the matter to Government.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF J. A. THOMSON . . . PETITIONER.

*Dismissal of complaint—Presidency Magistrates Act (IV. of 1877),
sections 32 and 124*1881
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—
No. 301 of
1880.

An order of dismissal, passed by a Presidency Magistrate under section 124 of the Presidency Magistrates Act, does not operate as an acquittal of the accused, and is no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint.

RULE to show cause why the order of Mr. Gupta, one of the Presidency Magistrates of Calcutta, convicting the petitioner under section 22 of the Telegraph Act (I. of 1876), and sentencing him to pay a fine of Rs. 200, or, in default, to undergo simple imprisonment for two months, should not be quashed.

It appeared that the charge upon which the petitioner had been convicted had formed the subject of a former complaint, which had been dismissed by the same Magistrate on account of the non-attendance of the complainant under circumstances which will be found stated at length in the judgment of Mr. Justice PRINSEP.

Branson, for the petitioner, contended that the order of dismissal amounted to an acquittal, and that the subsequent proceedings were therefore illegal.

Baboo Gooroodas Banerjee, contra.

The following judgments were delivered by the High Court (1):—

PRINSEP, J.—On a complaint made before the Presidency Magistrate under section 22 of the Telegraph Act, a summons was issued on the 4th September last, fixing the 15th for the trial. The complainant and two witnesses (the Telegraph clerk and peon) were then examined, and apparently to enable the complainant to prove that he had purchased the good will of the firm who were the addressees of the undelivered telegram, the trial was postponed until

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the 22nd, summons being granted to procure the attendance of Mr. C. T. Davis, an officer of the High Court, at 1 P. M. of that day.

The case was called on towards the commencement of the Presidency Magistrate's sitting, and the complainant being absent "when his name was called six times," the case was dismissed. Within a very short-time, the complainant appeared accompanied by Mr. Davis. The Magistrate at once saw the unfortunate result of his precipitate action, and thinking that he could not revive the trial, adopted an alternative course, and directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned, the trial was held on the 20th October, and, on the 25th, he was convicted and sentenced to pay a fine of Rs. 200.

The matter has now come before us under section 147 of the High Court's Criminal Procedure Act (X. of 1875), it being contended that the order of the 22nd September last dismissing the case amounted to an acquittal, and that, on the facts found by the Presidency Magistrate, the accused has been wrongly convicted under section 22 of the Telegraph Act.

I observe that the Presidency Magistrates Act (IV. of 1877) practically provides for only one mode of procedure in the trial of offences before a Presidency Magistrate, no distinction being drawn between cases which are appealable to the High Court and those in which the Magistrates' orders are final, except in the manner of recording evidence (section 115), the preparation of a charge (section 116), and in the addition to an order of conviction and sentence which is appealable "of a brief statement of the reasons for the conviction" (section 126). It seems, therefore, that the sections of the Act which provide for an order dismissing a complaint apply equally to all trials held by a Presidency Magistrate.

The exact effect of an order of dismissal is not declared except in a case dealt with under section 32, *i. e.*, when, after examining a complainant, the Magistrate considers that "there are no sufficient grounds for proceeding." In such cases it is expressly provided that "the dismissal of a complaint shall not prevent subsequent proceedings against the person complained against."

The Act, however, permits a Magistrate to dismiss a complaint

in consequence of the absence of the complainant at the commencement of the proceedings, and upon the day appointed "for the appearance of the accused person, or on any day subsequent thereto on which the case may be called on" (section 118), or on the day to which the hearing may have been adjourned, "in order to secure the attendance of witnesses, or for any other reason" (section 124). In both instances, it is left to the discretion of the Magistrate, either to dismiss the complaint, or again to adjourn the hearing: he is to determine whether he should impose upon the complainants the extreme consequences of neglect to attend, or whether a further adjournment should be granted.

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Mr. Branson, who supports the rule granted in this case, argues that, as section 32 provides that an order of dismissal passed under certain circumstances shall be no bar to further proceedings, it must be presumed that it was intended by the Legislature that, in all other cases, such an order shall have the same effect as an acquittal.

On the other hand, Baboo Gooroodas Banerjee contends with considerable force that an order of acquittal can be passed only under section 126, when, in a trial, the Magistrate finds the accused person not guilty; that the law declares that it is only when a complaint is withdrawn with the permission of the Magistrate (section 125) that any other order operates as an acquittal of the accused person; and that this is borne out by the terms of section 113.

It is to be regretted that the Legislature, having prominently before it the precise terms of section 212 of the Code of Criminal Procedure, left any doubt regarding the exact effect of an order of dismissal passed by a Presidency Magistrate. However, having carefully considered all that has been said on both sides, the terms of the law, and the inference that may legitimately be drawn from any omissions as already noticed, I am of opinion that an order of dismissal under section 124 does not operate as an acquittal of the accused. No inference can, in my opinion, be properly drawn from the express terms of section 32, that, in all other cases, an order of dismissal "shall prevent subsequent proceeding against the persons complained against." The rule, that *expressio unius est exclusio alterius*, cannot be applied where, in subsequent sections, the law (section 126) has provided that an order of acquittal shall be passed

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"if, in any case tried" by a Magistrate, he finds "the accused person not guilty," with only one exception, *i. e.*, where a case has been withdrawn with the Magistrate's permission (section 125), and when section 113, in providing for the plea of *autrefois acquit*, declares that it shall only be raised when a person has "once been tried for an offence," &c., &c. We have, I observe, no definition of what constitutes a trial such as is conveniently given in the Code of Criminal Procedure ; but it seems clear to me that, when all the evidence which is required by a Magistrate is, as we have in the case before us, not given, and when the Magistrate dismisses the complaint on account of the absence of the complainant before the time fixed for the re-commencement of the hearing, and the production of that evidence, it cannot be said that the trial has been completed.

Some remarks have been made regarding the inconvenience which would arise if an accused person, after the dismissal of the complaint, were again required to attend to answer it ; but it appears to me that, on the renewal of the complaint, the Magistrate can, before he grants a process, consider under section 32 whether there is any sufficient ground for proceeding, and, unless the complainant can satisfy the Magistrate, either by reason of the offence complained of being of a serious character, or that the original complaint should not have been dismissed, the Magistrate would be fully justified in declaring that there was "no sufficient ground for proceeding," and in summarily dismissing the complaint.

Under these circumstances, I am of opinion that there was no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint, and that, therefore, the objection taken before us should be disallowed.

I trust, however, that the injustice which has resulted from the precipitate order of the Magistrate dismissing the complaint will be a sufficient warning to him to exercise the discretion given to him by the law sparingly. In the present instance, it was an unjust order, not only because the case had been fixed for trial at a later hour, but because the attendance of the complainant does not appear to have been necessary in order to proceed with the hearing. The serious nature of the offence, it being punishable with imprisonment for two years as well as fine, should also have

made the Magistrate hesitate before he terminated the proceedings in so summary a manner instead of at least allowing it to be called on at a later hour.

As regards the legality of the conviction of the accused person on the facts found by the Magistrate, I see no valid ground of objection.

I am, therefore, of opinion that the rule should be discharged.

MORRIS, J.—It is much to be regretted that the Legislature have not declared what is the effect of an order of dismissal under section 124 of Act IV. of 1877. As has been pointed out, the case under consideration before the Presidency Magistrate was one which, under the Code of Criminal Procedure, would be called a warrant-case. There had been already one hearing in the presence of the accused, and evidence had been taken. A second hearing was fixed for the 22nd September, but, though the accused appeared on that date, the complainant did not appear, and so, under the discretion allowed him by the section, the Magistrate dismissed the complaint. It would have been satisfactory had the law made it perfectly clear that, in such a case, in spite of the accused appearing twice to hear, and, if necessary, to answer the complaint made against him, and in spite of that complaint being dismissed, he is liable at any future time to fresh proceedings being taken against him on the same subject of complaint. In section 32, which deals with a complaint being dismissed upon its presentation after the examination of the complainant, a special provision is entered that such "dismissal shall not prevent subsequent proceedings against the person complained against." And, in cases under Chapter VIII., relating to the inquiry by the Magistrate into cases triable by the High Court, express provision is made in the event of the absence of the complainant after examination of witnesses in the presence of the accused. The Act declares (section 87) that the absence of the complainant, except when the offence may be lawfully compounded, shall not be deemed sufficient for a *discharge*; and a discharge is described as "not equivalent to an acquittal, and no bar to the revival of a prosecution of the same offence." In a case of lesser gravity under Chapter X. triable by the Magistrate himself, when the circumstances are precisely similar, that is, when the accused has appeared, and witnesses have been examined, but the com-

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plainant has absented himself. The words of the section (124) are, "the Magistrate may *dismiss* the complaint." It might reasonably, therefore, be thought that a distinction is purposely drawn by the Legislature between the order to dismiss and the order to discharge, and that the former carries finality with it, whereas the latter does not.

At the same time, whatever may have been the real intention of this distinction of terms, and in the absence of any qualifying provision to the term "dismiss" in section 124, I am unable to disregard the other considerations which have been pointed out by my learned colleague. The succeeding section 125 deals with the case of a withdrawal of a complaint of a certain description, and contains an express provision that the withdrawal under this section of a complaint shall operate as an acquittal of the accused person. The question naturally suggests itself why, if the Legislature intended a dismissal under section 124 to operate as an acquittal, it did not make an express provision to that effect as in the case of a withdrawal under the subsequent section. Again section 129 prescribes: "If the Magistrate, *in any case* tried under this Chapter, finds the accused person not guilty, he shall record an order of acquittal. If the accused person is convicted, the Magistrate shall pass sentence upon him." In the particular case before us, the Magistrate, on the 22nd September, came to no finding at all, and recorded no order of acquittal or conviction. Having regard to the language of section 119, I understand the trial of the case to have commenced on the occasion of the first appearance of the accused, that is, the date fixed for the hearing, and it was not brought to its legitimate conclusion, because of the absence of the complainant, a circumstance which is specially contemplated and provided for in section 124. When, therefore, these sections, 124 and 126, are looked at in conjunction with section 113, which prescribes that a person, who has once been tried for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, the conclusion seems to be that, unless the antecedent trial has resulted in a conviction or acquittal, there is nothing in the law which prevents a person from being tried again for the same offence. Consequently an order of dismissal is not a bar to the

revival of fresh proceedings On the merits, I agree in thinking that there is no ground in law for disturbing the decision of the Magistrate. There is evidence which goes to show that the accused Thomson did not act "in good faith," that is, "with due care and attention," in retaining and keeping the telegraph message which, on the face of it, was addressed to a rival firm: The rule is discharged.

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[CRIMINAL APPELLATE JURISDICTION.]

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—
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IN THE MATTER OF ASGUR HOSSEIN APPELLANT,

Evidence Act (I. of 1872), section 33—Witness "incapable of giving evidence," Deposition of.

To bring a case within section 33 of the Evidence Act, in order to admit a deposition of a witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house, but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend.

Per PONTIFEX and FIELD, JJ.—The incapacity to give evidence contemplated by section 33 of the Evidence Act, in our opinion, is not necessarily a permanent incapacity.

In the Matter of Pyari Lall, 4 C. L. R. 504, doubted.

APPEAL from a conviction and sentence passed by the Sessions Judge of Chota Nagpore.

The facts, so far as they are necessary for the purposes of this report, fully appear in the judgment of the High Court.

M. Ghose, for the Appellant.

The judgment of the High Court (1) was as follows:—

We are of opinion that this appeal fails, and that the conviction of the lower Court is perfectly justified upon the evidence. Putting aside the evidence of one of the complainants, Darsun, who is alleged to have been sick, and who did not attend, and whose deposition was admitted by the Sessions Judge under section 33 of the Evidence Act, but whose deposition has not been read to us, we think there is ample evidence upon which to found a conviction.

The learned Sessions Judge had the witnesses before him, and he was satisfied as to their character and with their demeanour. Altogether he seems to have had no doubt whatever as to what his decision should be. As the evidence has been read to us, we also think that the conviction is right. The deposition before the

Deputy Magistrate of one of the complainants (Darsun) was admitted by the Sessions Judge under section 33 of the Evidence Act, it being stated by certain of the witnesses that he was ill and confined to his house. We are of opinion that the evidence as to his illness was not sufficient to bring the case within section 33 of the Evidence Act. The Sessions Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend. A case has been cited to us from 4 C. L. R. 504, *In the Matter of Pyari Lall*, in which it was held that the incapacity to give evidence mentioned in section 33 must be a permanent incapacity.

In our opinion, that is not a necessary construction. We are inclined to think, on the construction of the entire section, and from reference also to section 32, which precedes it, that something short of permanent incapacity might satisfy the words of the section—"incapable of giving evidence." It is not, however, necessary to decide that question in this case, or we might have to send the case before a Full Bench. It is sufficient in this case, without reading the deposition of Darsun, to support the conviction.

There was a preliminary objection which was taken, *viz.*, that the committing Magistrate had made a kind of preliminary inquiry in which he examined certain persons, some of whom were afterwards called as witnesses; that the appellant before us applied for the depositions given by these persons, and that, though they were so examined, in answer to his application, no depositions were forthcoming. This Court called for an explanation on this point. The Deputy Magistrate explains that this preliminary inquiry was conducted in the presence of the accused; that the inquiry he made of these particular persons was for the purpose of finding out whether there was any and what case; and that he did not take down their statements in writing, though he did examine them after swearing them. We think it was inofficious and improper to swear these witnesses on an occasion and for the purpose as stated; but, having sworn them, we are of opinion that, under the circumstances, he was not bound to take down their statements in writing, as the Deputy Magistrate was only the committing officer, and, as he did not try the case, we think that the accused has no cause of complaint in this respect.

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Judgment.

[CRIMINAL JURISDICTION.]

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Mar. 9th,
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EMPRESS APPELLANT;
AND
NUDDIAR CHAND SHAW RESPONDENT.

Act VII. (B. C.) of 1878, section 60—Wholesale, Sale of liquors by—Exciseable liquors, Sale of—Assortment.

A licensed retail vendor of exciseable liquors being the only person liable to the penalty provided by section 60 of Act VII. (B. C.) of 1878, the servant of such a vendor is not liable to conviction under that section.

*Quære:—*Whether a sale of 12 quarts of beer and 13 bottles of brandy is a sale of an assortment of spirituous liquor, and comes within section 15 of the Act.

REFERENCE under section 296 of the Code of Criminal Procedure submitted for the opinion of the High Court by the Sessions Judge of Hooghly.

The circumstances under which the reference was made were as follow:—

One Nuddiar Chand Shaw, servant of a licensed retail vendor of imported liquors, was convicted by the Joint Magistrate of Howrah of an offence under section 60 of the Bengal Excise Act of 1878, in having, as alleged, sold exciseable imported liquor by wholesale, and was sentenced to pay a fine of one hundred rupees.

The facts in evidence were that an informer was sent with instructions to demand the sale to him, by the same transaction, of 12 quart-bottles of beer and of 3 quart-bottles of brandy; and these quantities of such liquors respectively were supplied to him by the accused.

The Sessions Judge was of opinion that the sale of the two distinct quantities of different kinds of liquor, though in total quantity exceeding two gallons or 12 quart-bottles, did not amount to a wholesale sale within the meaning of the Act. He was also of

opinion that, in any case, the accused, being a servant only of the retail vendor, was not liable to the Act.

The opinion of the High Court (1) was, as follows:—

The accused has been convicted under section 60 of "The Bengal Excise Act," VII. (B. C.) of 1878. This section enacts that "Every licensed retail vendor who sells by wholesale . . . shall be liable for every such offence to a fine not exceeding two hundred rupees."

The Sessions Judge is of opinion that the conviction is bad (1) because the sale of twelve bottles of beer and three bottles of brandy at the same time is not a sale by wholesale; and (2) because the person convicted is not a retail vendor, but the servant of such a vendor.

We think that the Sessions Judge is right in his view of the law as to the second point.

As to the first point, there is more room for doubt. Under section 15 of the "Bengal Excise Act," the sale of a larger quantity of spirituous or fermented liquors than twelve quart-bottles would be a sale by wholesale. If, therefore, more than twelve bottles of beer or of brandy, *i. e.*, of the same kind of liquor, had been sold at one transaction, this would be a sale by wholesale. In this case two kinds of liquor were sold, and the quantity of neither kind exceeded twelve bottles. The case of such a sale is provided for by a clause of the section, which is in fact an explanation (cl. 12): "Under this section a sale of an assortment of spirituous or fermented liquors in greater quantity than is specified above by a licensed retail vendor is prohibited." If this provision stood alone, without any other provision following or qualifying it, the sale in the present case would probably be within the prohibition. The section then goes on to enact: "The Board may by rule define what shall be held to be an assortment for the purposes of this section." So far as we have been able to discover, there is no evidence that the Board have made a definition of "an assortment" from which would be excluded such a sale as that in this case—a sale, that is, of twelve bottles of beer and three bottles of brandy. This being so, the sale in question probably comes within prohibition in the explanation-clause above referred to, but, for the

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decision of this case, it is not necessary to determine this point, as we think that, upon the second ground, the conviction must be reversed.

We are clear that the licensed retail vendor himself is the only person liable to the penalty provided by section 60, and that the servant of such vendor is not liable to conviction under this section.

We set aside the conviction of Nuddiar Chand Shaw had under section 60 of "The Bengal Excise Act," acquit him, and direct that the fine, if realized, be refunded.

[CRIMINAL JURISDICTION.]

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AND

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Evidence Act (I. of 1872), sections 5, 6, 8, 11, 14— Evidence, on criminal trial, of unconnected acts of same nature as those charged.

In a trial upon three specific charges of receiving illegal gratification from the firm of C. and Co., at T., in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878 was offered :

Held that such evidence was inadmissible.

Per MITTER, J.—If the receipt of the several sums mentioned in the charges be considered to have been proved by *other* evidence, and if it were necessary to ascertain whether the accused received them as a *motive* for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 might be relevant under section 14 of the Evidence Act ; but they are not relevant for the purpose of establishing the fact of payment in 1876.

REFERENCE submitted by the Officiating Judges of the Special Court at Rangoon, under section 80 of the Burmah Courts Act (XVII. of 1875), for the opinion of the High Court.

[CRIMINAL.]

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Statement.

The point on which the Judges of the Special Court differed is thus stated by them:—

The accused was charged under section 161 of the Indian Penal Code with receiving illegal gratifications on three distinct occasions at Tonghoo in the year 1876 from the firm of Cohen and Co., and there were also three counts charging him under section 165 of the Indian Penal Code with reference to the same sums. He was tried before the Additional Recorder and a jury, and acquitted by a majority of the jury on all the charges, and the Additional Recorder, dissenting from the opinion of the majority, referred the case to the Special Court under section 263 of the Criminal Procedure Code.

At the trial, evidence was admitted of similar but unconnected receipts of illegal gratifications by the accused from the same firm of Cohen and Co during the years 1877 and 1878 at Thayetmyo. At both places, and in the three years, 1876, 1877, and 1878, the firm of Cohen and Co were doing business as Commissariat Contractors, and the accused was the manager of the Commissariat Office, first, at Tonghoo, and then at Thayetmyo.

The Officiating Judicial Commissioner, at the hearing before the Special Court, was of opinion that the evidence as to the similar but unconnected receipts of illegal gratifications at Thayetmyo during the years 1877 and 1878 was not admissible to prove the specific charges relating to the year 1876, and therefore thought that the verdict of the majority of the jury acquitting the accused should not be interfered with. The Additional Recorder was of opinion that that evidence was admissible, and that the verdict of the majority of the jury should be reversed.

The Officiating Judges, being unable to agree in a judgment, therefore referred the case, under section 80 of the Burmah Courts Act (XVII. of 1875), to the High Court of Judicature at Fort William.

The point as to which the Officiating Judges differ is as follows:—

Whether, in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878 is admissible.

Phillips (Standing Counsel) for the Crown. No one appeared for the prisoner.

The following judgments were delivered by the High Court (1):—

GARTH, C. J.—The prisoner in this case was tried before the Special Court at Rangoon upon three charges for receiving money illegally as a public servant, contrary to the provisions of sections 161 and 165 of the Indian Penal Code.

The transactions upon which the charges were based are all said to have occurred in the year 1876; and the nature of them was, that the prisoner, being then the managing clerk in the Commissariat office of Tonghoo, where Messrs. Cohen Brothers carried on business as Commissariat Contractors, accepted certain remuneration from Messrs. Cohen for services which he is said to have rendered them in his official capacity.

The case for the prosecution was that these services were rendered, and the remuneration received by the prisoner, under some arrangement which existed between the parties in the year 1876, but which came to an end in January 1877.

In the year 1877, the prisoner was transferred to the Commissariat office at Thayetmyo, and it was alleged by the prosecution that, in that year, Messrs. Cohen, who also carried on business as Commissariat Contractors at the latter place, made a similar arrangement there with the prisoner, and that certain sums were given to him as remuneration in that year for similar services.

Upon the trial, evidence was adduced on the part of the prosecution to show the receipt of these sums and the existence of this arrangement in 1877. But the learned Judges in the Special Court differed in opinion as to whether the evidence was admissible, and therefore, under section 80 of the Burmah Courts Act, they have referred the question to us in the following terms:—

“Whether, in trying the three specific charges of receiving “illegal gratification from the firm of Cohen Brothers at Tonghoo “in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmyo in the “years 1877 and 1878 is admissible.”

It has been contended by Mr. Phillips for the Crown that the evidence was admissible under some one or more of the sections from 5 to 14 of the Evidence Act, as showing the illegal nature of the transactions between Messrs. Cohen and the prisoner in 1877, and

(1), GARTH, C. J., MITTER and MACLEAN, JJ.

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the probability that, if sums were received by the prisoner from them for an illegal consideration in that year, the sums which were received from them by the prisoner in the previous year were also for an illegal consideration.

I believe that we are all agreed that this evidence was not admissible under any of the sections from 5 to 13 of the Evidence Act; but my brother Mitter is of opinion that it might be admissible under section 14 upon the grounds stated in his judgment.

After carefully considering this point and the authorities to which our attention was called by Mr. Phillips, I have come to the conclusion that the evidence was not admissible.

Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Edition, sections 318 to 322; that is to say, cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; as for instance, in actions of slander, or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff, or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge.

The illustrations to section 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable.

But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts*, and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions.

Suppose, for example, that usury was a crime by the law of this country, and that a prisoner was charged with having taken usurious interest from A. B. in a transaction which occurred in 1870. It seems quite clear to me that, for the purpose of proving the nature of this transaction in 1870, evidence could not be given of

some other usurious transaction having taken place between the same parties in 1871.

The question in such a case would be, not whether the prisoner had a mind prone to the commission of usury, or whether he was in the habit of making usurious contracts, but whether, in the particular instance, the prisoner had, *in point of fact, been guilty of usury.*

Now, as I understand the argument for the Crown in the present case, it amounts to this: In the year 1876, Messrs. Cohen were Commissariat Contractors at Tonghoo, and the prisoner was the managing clerk in the Commissariat. In the year 1877, these parties were employed respectively in the same way at Thayetmyo. In the year 1876 the prisoner is charged with receiving certain sums of money as bribes from Messrs. Cohen for showing them some favour in his official capacity, and he is proved to have actually received those sums. Under these circumstances, Mr. Phillips argues that evidence is admissible that, in the year 1877, he received other sums from Messrs. Cohen as bribes in order to prove that the sums which he received in 1876 he also received as bribes. But it seems to me that the question, whether he took the sums in 1876 as bribes for doing a favour to Messrs. Cohen, is in each case purely a question of fact. It is not, as it seems to me, a matter of intention or feeling, or knowledge; and I think that, in such a case, evidence is no more admissible to show that he took bribes from Messrs. Cohen in 1877 than it would be to show that he stole some of the Government money in 1876, because he afterwards stole some in 1877.

I would therefore answer the question referred to us by saying that, in my opinion, the evidence is not admissible.

MACLEAN, J.—I concur.

MACLEAN, J.

MITTER, J.—The facts of the case in which this reference has been made are briefly these:—

MITTER, J.

The accused was committed for trial on 12 separate charges of receiving illegal gratifications as a public servant under sections 16 and 165, the receipt of these several sums of money extending over a space of three years—1876, 1877, and 1878.

At the trial, the prosecution elected to proceed on three charges. The transactions out of which they are alleged to have arisen all

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happened in the year 1876. The accused was the managing clerk in the Commissariat Office at Tonghoo in the year 1876, where the Cohens transacted business as Commissariat Contractors. The evidence for the prosecution is, that there was an understanding between the Cohens and the accused under which he had agreed for certain remuneration to show to them certain favour in the exercise of his official functions; that this agreement came to an end in January 1877, when the accused was transferred to the Commissariat Office at Thayetmyo. That, in the month of June of that year, the Cohens, who also transacted business as Commissariat Contractors at the latter place, entered into a similar agreement with the accused, and the evidence of payments of money to him in 1877 and 1878 at Thayetmyo under the last-mentioned agreement was adduced in the course of the trial. The question of law that has been referred to us is as follows: Whether, in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878 is admissible.

I am of opinion that receipt of illegal gratification in the years 1877 and 1878 at Thayetmyo cannot be proved in order to establish that the accused received the three sums of money mentioned in the charges for which he was tried.

The two sets of transactions are not so connected as would make them relevant to one another within sections 5, to 14 of the Evidence Act.

Section 6 cannot apply, because the payments of 1877 and 1878 are not connected with the facts in issue in this case as to form part of the same transaction. The alleged agreement of 1876, according to the case for the prosecution, came to an end in January 1877, and the alleged payments in 1877 and 1878 were said to have been made under a different understanding.

The next section, under which it was contended in the lower Court that the transactions in 1877 and 1878 were relevant, was section 8. But it seems to me that it cannot be said that they show or constitute a motive or preparation for the facts in issue. Neither can the conduct of the accused as shown in the alleged transactions of 1877 and 1878 be said to have been influenced by the facts in

issue in the sense in which these words are used in the section. No doubt a person who commits a crime with impunity may ordinarily be found more ready to commit another crime of a similar nature, and in that sense the second crime may be considered to have been influenced to a certain extent by the commission of the first crime. But it seems to me that that kind of connection is not contemplated by this section. If it did, then, where a person is charged with an offence, the whole of the previous history of his life would be relevant, because every event of his life that preceded the commission of the crime may be considered to have influenced it in some way. But that is not the meaning of the section. The influence referred to here must be direct and obvious; and, in this sense, I cannot say that the transactions of 1877 and 1878 were in any way influenced by the facts in issue. The same observation will apply to the contention based upon section 11. There also the words "*highly* probable" point out that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two *highly* probable.

The only other section which it is necessary to notice is section 14. Under that section collateral facts specified therein can be proved if the question be as to the existence of any state of mind. In this case, if the receipt of the several sums of money mentioned in the charges be considered to have been proved to the satisfaction of the Court by *other* evidence, and if it be necessary to ascertain whether the accused *received* them as a *motive* for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 may in that case be relevant under this section. But they are not relevant for the purpose of establishing the *fact* of payment in the year 1876.

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[CRIMINAL JURISDICTION.]

IN THE MATTER OF SHAIKH AGHANI

AND

BHAGI HALWAI.

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No. 87 of
1881.

Penal Code (Act XLV. of 1860), section 379—Distrain—Act VIII. (B. C.) of 1869, section 6.

Persons removing property under the provisions of the Rent Law relating to distraint ought not to be proceeded against under the Criminal Law, but the parties aggrieved by a wrongful distraint should have recourse to the remedy provided by Act VIII. (B. C.) of 1869.

REFERENCE submitted under section 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of Tirhoot for the opinion of the High Court.

The terms of the reference as stated were as follow :—

“One Shaikh Aghani preferred a complaint to the Magistrate of Durbhangah, stating that he held 15 cottas of land under the accused No. 1, Turunt Lall Chowdhri, who, on account of his declining to lend him the use of his plough, came with his brother Gobind Lall and some 30 or 40 men upon this land, and cut and carried away his crop of paddy growing thereon. At the trial the accused, Turunt Lall Chowdhri, stated that the land and crop in question belonged to a ryot of his, named Muhhub, and that he had legally distrained his crops for arrears of rent, and that he, and his servants were therefore not guilty of theft.

“The Joint Magistrate, who tried the case in a very short judgment, in which he did not review the evidence adduced by both parties, held that the land and crop were in the complainant's possession, and that, under colour of distraint proceedings, the accused cut and removed the crop, and were therefore guilty of theft; and he sentenced Turunt Lall Chowdhri to pay a fine of Rs. 100; or in default to undergo 2 months' rigorous imprisonment, and Bhagi

Halwai to pay a fine of Rs. 10, or in default to undergo rigorous imprisonment for the same term.

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Statement

"Turunt Lall Chowdhri appealed to me, and I have reversed the Joint Magistrate's orders on the grounds that (a), on the proved and admitted facts of the case, the offence of theft has not been legally established, and (b) the evidence of the complainant and witnesses is untrustworthy, while the appellant has proved very clearly that the land in question was in the possession of his ryot Muhbub, and not of the complainant. The sentence passed on Bhagi Halwai not being by law appealable, he has prayed that his case may be referred for the orders of the Honourable Court, and I make the reference on the ground that the evidence before the Joint Magistrate did not warrant a conviction for theft under section 379 of the Indian Penal Code.

"The facts are clearly apparent from the documents filed on behalf of the accused. On October 19th, 1880, a written authority to distrain the crops of Muhbub was executed by the Malik in favour of his servant Bhageloo. On November 24th, 1880, Bhageloo applied to the Moonsiff having jurisdiction for assistance to distrain the crop of Muhbub. This application was rejected by the Moonsiff on the 26th November on the ground that no necessity for granting assistance had been shown. Then, on December 2nd, 1880, Bhageloo put in a petition stating that he had distrained Muhbub's paddy crop on November 27th, cut, threshed, and stored it on December 1st, and he prayed that the usual notice and proclamation of sale might be issued under section 80 of the Rent Law. The notice and sale-proclamation were accordingly issued. The above facts are not only proved beyond dispute, but they have been substantially admitted by the complainant in his petition to the Joint Magistrate dated December 17th, 1880, filed subsequently to his evidence against the accused being recorded by that officer. In this petition he signified his intention of instituting a civil suit against his landlord under the Rent Law (section 96), and prayed that his complaint might be struck off without trial.

"In the face of this admission on the part of the complainant, it seems to me that the case was at an end, and should have been dismissed. The proceedings admittedly taken by the landlord were regular, and in accordance with the provisions of the law on the

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subject of distraint, and to hold that, under such circumstances, he and his servants have been guilty of theft would, it appears to me, be overstraining the definition of theft as given in section 378 of the Penal Code. The complainant's proper remedy lies in a suit under section 96 of the Rent Law.

Judgment.

* * * *

"As I am of opinion that, on the admitted fact, the offence of theft has not been established, I respectfully submit that the conviction and sentence, as regards the accused Bhagi Halwai, should be quashed, and the fine or any portion of it, if realized, should be refunded to him by the orders of the Honourable Court."

The opinion of the High Court (1) was as follows:—

We agree with the Sessions Judge in this case, and we reverse the conviction of the petitioner Bhagi Halwai. The persons erroneously convicted of theft were clearly acting under cover of the provisions of the Rent Law relating to distraint, and that law provides damages for the abuse of these provisions. The parties concerned, if aggrieved, should have resorted to the remedy so provided, and should not have set the criminal law in motion.

The conviction of Bhagi Halwai is set aside, and the fine, if realized, must be refunded.

(1) PONTIFEX and FIELD, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF BEHALA BIBI . : . . APPELLANT.

1881
Mar. 7th.*Penal Code (Act XLV, of 1860), section 201—False information.*No. 86 of
1881.

Section 201 of the Penal Code is not intended to apply to the case of a person who appears to be the possible or probable offender, making statements exculpating himself by inculpating another.

APPEAL from a conviction and sentence passed by the Sessions Judge of Jessore under section 201 of the Indian Penal Code.

The facts appear from the judgment of the High Court (1), which was as follows:—

We think that the conviction in this case cannot be sustained.

The facts are as follow: Behala, the appellant, with her infant, was sleeping in the same room with her husband. Her husband, on awaking about dawn, found her and the child missing. After some search, she was found at a relation's house, but without the child. As to what had become of the child, she then and subsequently made contradictory statements. She said at one time that she had left it in the room with her husband. At another time, she said that she had been enticed away by one Rakhal; that the child had cried, and Rakhal had said, "Let me go and leave it with its father;" that he then took the child away and quickly returned, upon which she and Rakhal went away together.

Before the Magistrate she said that one Herasatula had enticed her away, and that he had thrown the child into the river.

The Sessions Judge has believed the last story, and has convicted the woman under section 201 of the Indian Penal Code of giving false information respecting the murder of Ujjala, her infant, with the intention of screening the murderer from legal punishment, *i. e.*, with the intention of screening Herasatula. The information said to be false is that contained in her statement as to Rakhal. Now there is no evidence to show that the story about Herasatula

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is more true than that about Rakhal: and there is no good reason why the Judge should adopt one story rather than the other.

As to what the woman stated about Rakhal, the evidence is very meagre as to the exact language and the exact occasion upon which this language was used; and the statement, as given by the police-officer, Bireshur, is certainly not information respecting the murder of Ujjala, for she said merely that Rakhal had taken the child away after expressing an intention of leaving it with its father.

The unfortunate woman appears to have disappeared by night from her husband's side, and there is much reason to suppose that she took her infant with her. She was found some time after without her infant, which was of too tender an age to take care of itself. Under these circumstances grave suspicion attached to the woman.

When she was arrested, she made contradictory statements as to what she had done with the child. Her manifest object in making these statements was to exculpate herself. We think that section 201 of the Penal Code was not intended to apply to such a case—a case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculpating another.

That Herasatula murdered the child, and that Behala, knowing this, gave information respecting the murder, with the intention of screening Herasatula from punishment, rests upon no evidence. We reverse the conviction, and direct the release of the appellant Behala.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF JAMARIA APPELLANT.

1881
Jan. 22nd.*Penal Code (Act XLV. of 1860), section 211—False charge.*No. 735 of
1880.

A Station Staff Officer having neither magisterial nor police powers, a false charge made before him does not amount to such a criminal proceeding as is referred to in section 211 of the Indian Penal Code.

A "false charge," to make the above section applicable, must be made to a Court, or to an officer who has powers to investigate and send it up for trial.

APPEAL from a conviction and sentence passed by the Judicial Commissioner of Chota Nagpore, under section 211 of the Indian Penal Code, on the 18th September 1880.

The facts, as far as necessary, appear from the judgment of the High Court (1), which was as follows:—

This case came before one of the Judges of the present Bench in the vacation, and it occurred to him that no charge was made

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to any one competent to act upon it. Enquiries were therefore made as to the powers (magisterial or police) of the Station Staff Officer.

From the papers it will be seen that he has no such powers.

The appellant appeared before Captain Simpson, Adjutant, 11th M.N.I., and Station Staff Officer, and charged a non-commissioned officer with rape. There was an inquiry, and the charge being found to be false by the Military Authorities, the Commanding Officer caused the appellant to be prosecuted before the Criminal Authorities under section 211. She was committed for trial, and convicted by the Judicial Commissioner under that section.

We are of opinion that the appellant neither instituted, nor caused to be instituted, a criminal proceeding. She no doubt charged the non-commissioned officer with an offence, but the Station Staff Officer having neither magisterial nor police powers, as we are informed, it seems to us that section 211 will not apply. We do not think it is unduly refining the words of the section to say that the false charge must be made to a Court, or to an officer who has powers to investigate and send up for trial.

We therefore set aside the conviction, and direct the appellant's discharge.

[CRIMINAL JURISDICTION.]

GOBIND CHUNDER MOITRA APPELLANT;

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Mar. 4th.

AND

No. 37 of
1881.

ABDUL SAYAD AND OTHERS RESPONDENTS.

Criminal Procedure Code (Act X. of 1872), section 530—Jurisdiction of Magistrate—Magistrate's duty to maintain decree or order of competent Court—Land Registration Act, Order under, as to possession—"Dispute"—Breach of peace—Act X. of 1872, section 491.

The principle that, where there has been a decree passed between rival claimants to immoveable property, it is the duty of the Magistrate to maintain such decree, is applicable to orders in proceedings under the Land Registration Act declaring a particular person in possession.

Accordingly, where an order had been made under that Act, in the presence of both parties, and after evidence taken on both sides, declaring one of the parties to have proved possession, and entitled to have his name registered, and pending the confirmation of that order, disputes arose as to the land in question, it was held, on the ground that, when the rights of the parties had been determined by a competent Court, there was no longer a "dispute" within the meaning of section 530 of the Code of Criminal Procedure, that it was not competent to the Magistrate to take proceedings under that section.

The proper course for a Magistrate to pursue if the unsuccessful party does any act that may probably occasion a breach of the peace is to take action under section 491 of the Code of Criminal Procedure.

RULE to show cause why an order passed by the Deputy Magistrate of Pubna on the 20th January 1881 should not be set aside. The circumstances under which the rule was obtained appear from the judgments delivered by the Divisional Bench of the High Court by which the case was heard.

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H. Bell and Baboo *Ishun Chunder Chuckerbutty* in support of the Rule.

Lee and Baboo *Tarack Nath Palit* showed cause.

The following judgments were delivered by the High Court (1) :—

PONTIFEX, J.—I think this rule must be made absolute, and the order of the Deputy Magistrate must be discharged. In giving my reasons for this decision, it is necessary to advert shortly to some circumstances which preceded the order made by the Deputy Magistrate. The person asking for the rule is one Gobind Chunder Moitra, who alleges that, in March 1879, he purchased the property with respect to which the order which he seeks now to set aside was made under section 530 of the Code of Criminal Procedure, the date of such order being the 20th January 1881. On the 20th March 1879, Gobind Chunder applied under the Land Registration Act to have the land registered in his name. The decision of the Deputy Collector, in which he found that Gobind Chunder had proved possession, and was entitled to registration, was not passed until the 24th December 1879.

Now, it appears that, prior to this alleged purchase by Gobind Chunder Moitra, Abdul Sayad and Abdul Mayid, who now oppose the Rule, had obtained registration of the property in their names, under the Land Registration Act, on the 6th March 1879. It was therefore impossible for the Deputy Collector, on the 24th December 1879, to direct that the land should be registered in the name of Gobind Chunder Moitra. It was necessary that, for that purpose, his proceedings should go up to the Commissioner, who, if he confirmed the decision of the Deputy Collector, alone had the power to direct that the registration in the names of Abdul Sayad and Abdul Mayid should be cancelled in order that registration might be effected in the name of Gobind Chunder Moitra. The proceedings accordingly went before the Commissioner, but it was not until the 29th September 1880 that he passed his final orders, and, under those orders, in the month of October 1880, the registration in the names of Abdul Sayad and Abdul Mayid was cancelled, and Gobind Chunder Moitra's name was finally registered. These registration-proceedings, therefore, occupied a period extending from

(1) PONTIFEX and FIELD, JJ.

the 18th March 1879 to October 1880. It must, however, have been manifest to Abdul Sayad and Abdul Mayid, from the 24th December 1879, when the Deputy Collector decided in favour of Gobind Chunder's possession, that there was every probability that the result of the proceedings would be, that the property would be registered in the name of Gobind Chunder Moitra. As it seems to me, to evade these consequences, and while the reference was pending before the Commissioner in order that his ultimate orders might be obtained, recourse was had to proceedings under section 530, which were commenced in July 1880.

In the registration-proceedings under the Land Registration Act, the Deputy Collector had decided the question in the presence of both parties. Each party had had an ample opportunity of adducing all the evidence that he thought necessary to prove his case. Each party did adduce evidence, and, upon that evidence, the Deputy Collector, acting under the Land Registration Act, finally decided that Gobind Chunder Moitra *had proved possession*, and that he was entitled to have his name registered. Now, the criminal proceedings in July 1880 were started by certain ryots submitting a petition of complaint alleging that others of the ryots, at the instigation of Gobind Chunder Moitra, were going to do certain acts which would tend to a breach of the peace. Upon the receipt of that complaint, a police-report was called for, and a report was accordingly made by the police. Their report is, that there were two persons who claimed to be landlords; that certain of the ryots took the part of one side and others of the other side; and that, at a future time when the crops came to be cut, it was probable that the ryots of one side might cut the crops which had been grown by the other side, and a breach of the peace might ensue. But the police recommended that it would be sufficient if the leading ryots on either side were bound over to keep the peace. Upon that report, the District Magistrate, who possibly had no notice of the registration-proceedings, held a proceeding under section 530, and referred it to the Deputy Magistrate, who was the very same person who, as Deputy Collector, had decided the land-registration case in favour of Gobind Chunder Moitra, finding that he had proved that he was in possession of this property. The Deputy Magistrate took evidence with respect to the complaint under section 530. There was nothing in the police report to implicate Gobind Chunder

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Moitra in any of the acts out of which it was suspected a breach of the peace might ensue. The police had only implicated the ryots. But, notwithstanding, the Deputy Magistrate, in his office of Deputy Collector, had, so recently and after a full investigation, decided that possession was in Gobind Chunder Moitra, he considered that he might altogether disregard his prior proceedings as Deputy Collector, and proceed again under section 530 to determine who was in actual possession of this land, being the very same question which he had already tried and decided.

Now, in my opinion; the fact, that these registration-proceedings were pending at the time that the application was made for interference under the Criminal Procedure Code, should have made the Deputy Magistrate extremely careful not to make any order as to possession under section 530 unless he was quite satisfied that a *bond-fide* dispute existed, and that a breach of the peace was imminent. The Meahs, knowing that the registration-proceedings could, under ordinary circumstances, only properly be set aside by a regular suit, though they might avoid being obliged to resort to that remedy if they could set the Criminal Court in motion under section 530, and hence this alleged quarrel between the ryots and the application to the District Magistrate.

Unfortunately the Deputy Magistrate, altogether disregarding the former order that he made after a full trial, has now entirely rendered nugatory his order of October 1880. In my opinion the Deputy Magistrate, knowing that the land-registration proceedings only awaited formal completion, ought not to have proceeded under section 530 to deal with the question of possession—a question which he had himself so recently decided in the presence of both parties. It would have been quite sufficient, if he thought a breach of the peace was imminent, to bind over the leading ryots on either side as recommended by the police. There was nothing to show from the police-report that Gobind Chunder Moitra was implicated in the acts complained of, and it seems to me, in passing the order in respect of possession, and in setting aside his own order, the Deputy Magistrate was acting improperly and unfairly to Gobind Chunder Moitra. It was never intended that the provisions of section 530 should be used for the purpose of avoiding a decision so recently arrived at after a full trial.

The Rule will be made absolute. and the order of the Deputy Magistrate set aside.

FIELD, J.—I also am of opinion that this Rule must be made absolute, and the order of the Deputy Magistrate set aside. Under section 530 of the Criminal Procedure Code, a Magistrate, in order to give himself jurisdiction, must first record a proceeding setting forth that he is satisfied that a dispute likely to induce a breach of the peace exists concerning land, &c., and this proceeding must state the grounds upon which he is so satisfied. It appears to me that, in the case before us, the proceeding recorded by the District Magistrate is defective in that it does not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question between Gobind Chunder Moitra on the one side and the Meahs on the other side; and that it is further defective in that it does not set forth the grounds upon which he was so satisfied that such dispute existed. The Magistrate's proceeding refers to a police-report, which may perhaps be taken to be incorporated by reference. I think the proceeding itself ought to contain all the particulars essential to give the Magistrate jurisdiction; and that reference to any other document ought not to be necessary in order to the ascertainment of these essential particulars. But, even if the police-report be here taken to be part of the proceeding, the above defects are not removed, as this report shows merely that there was a dispute between two sets of ryots in the village, who had respectively taken the sides of Gobind Chunder Moitra, and of the Meahs. Now, the ryots are not parties to the present proceedings; the only parties being Gobind Chunder Moitra on the one side and the Meahs on the other side; and it thus appears that the real "parties concerned in the dispute" were not the parties called upon to attend Court, and state their claims to actual possession. There is another ground upon which it appears to me that the order of the Deputy Magistrate in this case should be set aside, and that is, because there was no such *dispute* as is contemplated by section 530. When once a Magistrate has recorded the preliminary proceeding under the section, and has called upon the parties concerned in the dispute to appear before him, the express language of the section does not provide for any further inquiry into the fact of the existence of a

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dispute likely to induce a breach of the peace. When the parties appear before the Magistrate, the law expressly requires only that the fact of actual possession be inquired into. But it appears to me that the essence and basis of the jurisdiction, which a Magistrate can exercise under section 530, depends upon there being a dispute likely to create a breach of the peace; and that, when the parties appear before the Magistrate, if they are able to show, or it otherwise appears to the Magistrate, that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand, and not proceed further.

I take it that the term "dispute" in section 530 means a reasonable dispute, a *bonâ-fidâ* dispute, a dispute between parties who have each some semblance of right, or supposed right. It has been decided by this Court in a case to be found in *Rai Mohun Roy vs. Wise*, 16 W. R., Cr., 24, that, when a decree has been passed by a Civil Court regarding land in dispute, it is the duty of a Magistrate to maintain it; and he has no power again to institute proceedings regarding such land under this section of the Code of Criminal Procedure. The principle of this decision is this: that, when the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party. In other words, the defeated party will not be allowed to go to the Criminal Court, and, alleging the existence of a dispute, invoke the aid of the Magistrate and the police to neutralize the effect of the decree of a competent Civil Court. When the rights of the parties have been determined, there is no longer a "dispute" within the meaning of section 530; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under section 491 of the Code of Criminal Procedure, and require from such person security to keep the peace.

In the case of *Rai Mohun Roy vs. Wise*, 16 W. R., Cr., 24, the question of title had been definitively determined by the Civil Court, and no case has, so far as I am aware, as yet arisen in which the principle of that decision has been carried further, or extended to cases in which there has been merely a summary adjudication upon the question of possession. I think, however, that the proceedings under the Land Registration Act are proceedings to which the same principle should be

extended. Under this Act a revenue-officer is directed to hold an inquiry; that inquiry, in this particular instance, was held in the presence of both parties; and they had an opportunity of producing before the revenue-officer evidence to show that they were in possession of the land. After making his inquiry, the revenue-officer came to the conclusion that Gobind Chunder Moitra was in possession; his name was registered in the Collector's General Register as that of the person in possession of the estate; and the result of this registration is, that the Meahs are not entitled to sue the tenants for rents; for, to any such suit, it is a sufficient defence that their names are not registered in the Collector's General Register.

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If, after these formal proceedings before the revenue-authorities, it is competent to the Magistrate to take action under section 530, an order made under this section may absolutely neutralize the effect of the registration-proceedings (as has happened in this case), and great confusion and possible injustice may be done. Persons who have had experience in the mofussil are well aware why an order under section 530 is so strenuously sought after in many cases. Such an order is important as regards the question of limitation. The person who is declared by the order of the Magistrate to be in possession under section 530 can successfully set up such possession in answer to a plea of limitation.

The question of burden of proof, no unimportant question in many cases, depends materially upon whether a party occupies the position of a plaintiff or a defendant in a civil suit, and the person who succeeds in getting the Magistrate to declare him to be in possession obtains no small vantage ground for subsequent litigation. *Melior est conditio defendentis.*

Then, whether a person who has a good title will be able to procure witnesses to give evidence in his favour depends in no slight degree upon whether he is in possession or out of possession. Regard being had to these considerations, I think that Magistrates should be most careful in applying the provisions of section 530; that they should not proceed to act under this section unless they are satisfied that a dispute, a *bonâ-fidè* dispute, a reasonable dispute, a dispute in which there is some semblance of right on either side, exists; and that such dispute is likely to induce a breach of the peace. I am satisfied that it was not the intention of the Legisla-



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ture that the provisions of this section should be applied to any case in which a competent Court, whether in a regular suit or in that sort of proceeding which is in this country known as a summary proceeding, has decided that one person is entitled to, or is in possession of, land.

*Judgment.*

FIELD, J.

I may refer to section 535 of the Code of Criminal Procedure by way of further argument in support of this view. This section enacts that "Nothing in this chapter shall affect the powers of a Collector or a person exercising the power of a Collector, or of a Revenue Court." The officer acting under the Land Registration Act is probably a Revenue Court; and, if a Magistrate may, under section 530 of the Code of Criminal Procedure, decide that a person is in possession, whom a revenue-officer has, under the provisions of the Land Registration Act, held not to be in possession, the powers of such revenue-officer or Court would be materially affected.

It therefore appears to me that the order of the Deputy Magistrate should be set aside—(1) because the initiative proceeding of the District Magistrate was defective; (2) because the whole of the proceedings were without jurisdiction.

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## [CRIMINAL JURISDICTION.]

PROSUNNO COOMAR CHATTERJEE AND ANOTHER  
AND  
THE EMPRESS.

*Penal Code (Act XLV. of 1860), section 188—Order prohibiting collection of rent—Act X. of 1872, section 518.*

1881  
Jan. 19th.  
No. 308 of  
1880.

In case of a dispute between rival parties as to the payment of rents by tenants, a Magistrate has no power, under section 518 of Act X. of 1872, to make an order that no rents should be collected until such time as the right and title of both parties should have been established by order of a competent Court, and a conviction under section 188 of the Penal Code for disobeying such an order cannot be sustained.

**M**OTION to set aside a conviction and sentence passed by the Joint Magistrate of Goalundo on the ground that such conviction and sentence were illegal.

Baboo *Kali Churn Banerjee* and Baboo *Girja Sunkur Mo-joomdar*, for the Petitioners.

The facts appear from the judgment of the High Court (1), which was as follows:—

The petitioners have been convicted, under section 188 of the Penal Code, for disobedience of an order which prohibited them from collecting rents from shop keepers in the Goalundo bazaar.

This order was passed in May last in consequence of disputes between the petitioners and their rivals. The immediate cause of the order was a petition by one *Kisori Boistomi*, who complained that, owing to her refusal to pay rent to one of the rival parties, the agents of the other had attacked her house, and broke some portion of it. We do not find that this complaint was dealt with in the usual way, or the outrage inquired into, but an order was at

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*Judgment.*

once passed by the Magistrate and addressed to the "naibs and  
 "agents of both parties," setting forth that, "in consequence of the  
 "opposition of the parties, there was an increasing ever-present  
 "probability of an immediate disturbance leading to riots and  
 "affrays between the partisans of one and the other. If any attempt  
 "be made to collect rents, a notice to be issued to the naibs and  
 "agents of both parties to refrain from collecting rents till such  
 "time as the right and title of both parties be established by order  
 "of a competent Court." The order was headed as a proceeding  
 under section 518, Criminal Procedure Code.

If the course adopted is the legal one, then, whenever a dispute  
 arises, and some one complains of violence offered to him or her  
 individually, rent-collection is to be indiscriminately suspended  
 whether the complaint is well founded or the reverse. A claimant  
 who has not a shadow of a title may thus put the rightful owner  
 to great inconvenience and loss, and tenants who are willing to  
 pay their rents must not be asked for them, and limitation may  
 bar claims thus suspended.

We have no hesitation in saying that section 518 was never  
 intended to authorize an order of the sort now under consider-  
 ation, and, as we consider it was an order which the Magistrate  
 had no power to pass, we think the conviction for disobeying it  
 cannot be supported.

We set aside the conviction, and direct that the fines be  
 refunded.

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## [CRIMINAL JURISDICTION.]

IN THE MATTER OF BRAMANUND BHUTTA. }  
 CHARJEE . . . . . }... APPELLANT.

1881  
 Mar. 10th.

*Penal Code (Act XLV. of 1860), section 211—False charge—Criminal proceedings, Institution of—Suspicion, Statement to police of.*

No. 810 of  
 1880.

A statement made to the police of a suspicion that a particular person had committed an offence is not a "charge" within the meaning of section 211 of the Indian Penal Code, nor does it amount to the institution of a criminal proceeding, and the person making the statement cannot, on the suspicion being proved to be unfounded, be convicted under that section.

THE facts of the case, as disclosed in the evidence, were as follow:—

The prisoner laid a complaint at the thannah stating that a dacoity had been committed in his house by a gang of 30 or 35 persons whom he was unable to recognize in the dark, and then added, "*Mohesh Roy was one of the dacoits. I suspect him, because he is my enemy.*" Thereupon the police held an investigation, in the course of which the house of Mohesh Roy was searched. The prisoner there identified a brass lota as part of the stolen property. This lota, however, was claimed by Mohesh Roy as his own, and was afterwards found by the Sessions Judge to be really his. It was also in evidence that, three days after the first information, the prisoner pointed out to an Inspector of Police the broken staple of a door in his house in proof of the dacoity, although, according to the testimony of another police-officer, it had been previously examined and found to be uninjured. The police eventually reported that the complaint was false, and the Magistrate of the district, having accepted that view of the case, ordered a prosecution under section 211 of the Indian Penal Code, which resulted in the conviction of the appellant.

*L. Ghose and Baboo Boido Nath Dutt*, for the Appellant.

*L. Ghose.*—The conviction is bad. The prisoner had no opportunity of proving his case before the Magistrate. It has

[CRIMINAL.]

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**BHUTTA-**  
**CHARGE.**

**Argument.**

been repeatedly held by this Court that a conviction under section 211 is illegal where the accused has not had such an opportunity. *Reg. vs. Hera Lall Ghose*, 13 W. R., Cr., 37; *Reg. vs. Gour Mohun Singh*, 16 W. R., Cr., 44; *Sreenath Mundle vs. Sreeram Rajput*, 24 W. R., Cr., 62; *Syed Nissar Hossain vs. Ram Golam Singh*, 25 W. R., Cr., 10; *In the Matter of Choolhaie Telee*, 2 C. L. R. 315, and *In the Matter of Gangoo Singh*, 2 C. L. R. 389; *Nusibunnissa Bibee vs. Sheikh Erad Ali*, 4 C. L. R. 413 and 534; *In the Matter of Russick Lall Mitter*, 7 C. L. R. 382.

[MITTER, J.—But, in all these cases, there was a complaint before the Magistrate. In this case the prisoner did not follow up his information to the police by a complaint before the Magistrate.]

It is submitted that the distinction does not explain the cases. A false charge before the police and a false complaint before the Magistrate are distinct offences, and the one is not merged in the other. Therefore, if the distinction is sound, the conviction in all the cases cited might have been upheld as regards the false charge before the police irrespective of the proceedings before the Magistrate. There is only one case *Ashrof Ali vs. Empress*, 1 L. R., 5 Cal. 281, in which this distinction is expressly drawn. But, in a very recent case, *Empress vs. Karimdad*, 7 C. L. R. 467, the distinction was not recognized.

The conviction is also bad, inasmuch as the prisoner did not make a charge or institute proceedings against Mohesh Roy within the meaning of section 211 of the Indian Penal Code. He only stated his suspicion, which ought to have been taken for what it was worth.

[PONTIFEX, J.—According to that argument, any person may protect himself from future consequences by saying, "I suspect so and so."]

The aggrieved party might have brought an action for slander, but there can be no proceedings under section 211 until a charge is actually made. Here the prisoner only stated his suspicion.

[PONTIFEX, J.—The police acted upon that statement, and searched Mohesh Roy's house, and the prisoner was present during the search.]

The police were not bound to act upon the mere suspicion of the prisoner. If they chose to act upon it, they did so on their own

responsibility. When Mohesh Roy's house was searched, the prisoner was bound to be present.

[PONTIFEX, J.—But there was false identification of property and fabrication of false evidence.]

Even in true cases, there is very often exaggeration and even fabrication of evidence. But the question is, did the prisoner 'charge' Mohesh Roy within the meaning of section 211?

[MACLEAN, J.—The section is not limited to cases when a charge is actually made. The words of the section are wider.]

The words are "whoever institutes or causes to be instituted any criminal proceeding, or falsely charges," &c. The mere statement of one's suspicion does not amount to the institution of a criminal proceeding. Such a statement may be worthless, and the police ought not to have searched Mohesh Roy's house in the absence of more substantial grounds.

[PONTIFEX, J.—If the statement of the prisoner was not *bonâ fide*, he ought to be responsible.]

If the statement was not *bonâ fide*, the prisoner might have been proceeded against for defamation or slander. But, as he did not make a charge or institute a criminal proceeding, he ought not to be held responsible for the proceedings of the police, who acted on a statement on which they ought not to have acted. There may be other remedies, but it is submitted the conviction under section 211 is bad in law.

The Court (1), having taken time to consider, delivered the following judgments on the 10th March 1881:—

PONTIFEX, J.—As the learned Judges who heard the appeal are of opinion that a dacoity was actually committed, but differ with respect to the conviction of the appellant for falsely charging Mohesh Roy with the offence, I have directed my judgment as to the latter point only.

If a dacoity was committed, I am of opinion that the appellant ought to be acquitted, because the manner in which he mentioned the name of Mohesh Roy to the police would not thus amount to a false charge. It would amount only to providing the police with a possible clue for investigating the matter which they might or might not follow up as they considered fit.

(1) PONTIFEX, MITTER, and MACLEAN, JJ.

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*Judgment.*

MITTER, J.

Under these circumstances I think the accused should be acquitted.

MITTER, J.—I am also of the same opinion. It seems to me that the finding of the Judge that there was no dacoity in the house of the appellant is not warranted by the evidence. On the other hand, the evidence to my mind is sufficient to support the conclusion that the appellant's statement upon this point, though exaggerated, was not wholly without any foundation in truth. If, therefore, there was a dacoity, the evidence, in my opinion, is not sufficient to prove that the appellant falsely accused Mohesh Roy *knowing* that there was no just ground for the accusation. The appellant will therefore be acquitted and discharged.

## [CRIMINAL JURISDICTION.]

\* 1881  
*Fe. 15th*

No. 23 of  
 1881.

IN THE MATTER OF JUGGERNATH SAHAI AND } APPEALANTS.  
 ANOTHER . . . . . }

*Penal Code (Act. XLV. of 1860), sections 191 and 193—False evidence given before a police-officer—Inquiry, Preliminary—Criminal Procedure Code (Act X. of 1872), section 119.*

Persons giving false answers to questions put by a police-officer conducting an inquiry preliminary to a proceeding before a Court of Justice may be convicted of giving false evidence under sections 191 and 193 of the Indian Penal Code.

*Reg. vs. Nim Chand Mookerjee*, 20 W. R., Cr., 41, followed.

**M**OTION to set aside a conviction and sentence passed by the Magistrate of Pachumba, and confirmed on appeal by the Judicial Commissioner of Chota Nagpore.

The petitioners in this case were convicted and sentenced under section 193 of the Indian Penal Code, each to one year's rigorous imprisonment, for giving false evidence before a police-officer.

It appeared that, in an inquiry which was being conducted by a Police Inspector, they had, in answer to questions put to them, stated that certain property belonged to them, whereas the property in question did not in fact belong to them. They admitted that the statements made by them were false, but they alleged that they had been induced to make them by the threats of the police. They were unable, however, to substantiate this allegation.

The Judicial Commissioner was of opinion that, inasmuch as the inquiry was preliminary to a proceeding before a Court of Justice, the investigation was a judicial proceeding. He referred to *Reg. vs. Soondur Putnaik*, 3 W. R., Cr., 59. He was further of opinion that the petitioners were, under section 119 of the Criminal Procedure Code, bound to speak the truth, and, relying upon *Reg. vs. Nim Chand Mookerjee*, 20 W. R., Cr., 41, he considered the conviction and sentence legal and proper.

The petitioners now sought to quash the conviction.

Baboo *Kali Kissen Sen*, for the Petitioners.

The judgment of the Court (1) was as follows :—

We consider that in this case the accused were bound to answer the questions put to them by the police, and that consequently, having given false answers, they committed an offence under sections 191 and 193 of the Indian Penal Code.

We may observe that in this view we are supported by the Ruling of Mr. Justice MARKBY and Mr. Justice BIRCH in the case reported in 20 W. R., Cr., 41.

The application is rejected.

(1) CUNNINGHAM and PRINSEP, JJ.

1881  
In re  
JUGGERNATH  
SAHAJ.  
Judgment.



## [CRIMINAL JURISDICTION.]

IN THE MATTER OF KALI KRISHTO THAKUR

AND

GOLAM ALI CHOWDHRY . . . . . APPELLANT.

1881  
 Mar. 23rd.  
 No. 61 of  
 1881

*Criminal Procedure Code (Act X. of 1872), section 530—Proceeding to be recorded under section 530 of Act X. of 1872—Police report, Incorporation of, in proceeding recorded by Magistrate—Possession—Title, how far evidence of possession.*

Where action was taken under section 530 of the Criminal Procedure Code, the Magistrate recorded the following statement—"whereas, from the police-report, a breach of the peace is probable"—as the ground of his proceeding under that section.

*Held* that the proceeding thus recorded by the Magistrate was not in itself a sufficient compliance with the requirements of the section, which requires that the proceeding shall state that the Magistrate is satisfied that a dispute likely to induce a breach of the peace existed, and the ground upon which he is so satisfied, but that the police-report referred to might be incorporated to show that a dispute likely to induce a breach of the peace existed, and that there were grounds upon which the Magistrate might reasonably be satisfied.

Where there has been substantial evidence of possession or a conflict of evidence on that question, the Magistrate is justified in looking to the evidence of title in corroboration of the evidence of possession.

**R**ULE to show cause why an order passed by the Deputy Magistrate of Muduripore in Furrripore under section 530 of Act X. of 1872 should not be set aside. The circumstances under which the rule was obtained, and the grounds upon which the order in question was sought to be set aside, will be found in the judgments of the Court.

*M. Ghose, Baboo Doorga Mohun Dass, Baboo Kalimohun Dass, and Baboo Ram Sukhu Ghose, for the Petitioners.*

*H. Bell and Baboo Seetanath Ghose showed cause.*

The following judgments were delivered by the High Court (1) :—

FIELD, J.—This is a case under section 530 of the Code of Criminal Procedure. The land in dispute is a piece of newly-formed chur land. It was claimed by one party as belonging to his estate Jahazmara, and by the other party as belonging to the mehal Punchkata. This rule was obtained substantially on three grounds—*first*, that the preliminary proceeding of the Magistrate was defective; *secondly*, that the order made by the Magistrate is bad, inasmuch as it does not contain a sufficient description by boundaries, so as to enable the land in respect of which the order has been made to be identified; and, *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title; and that he had not evidence of possession before him which could justify him in making the order.

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FIELD, J.

As to the first of these points, the learned Counsel for the petitioner relied on the case of *Sheikh Munglo vs. Durga Narain Nag*, 25 W. R. (Cr. R.) 75. In that case no proceeding whatever was recorded by the Magistrate who initiated the proceedings under section 530 of the Code of Criminal Procedure. There was merely an order endorsed on the back of the police-report, which order was in these terms: "Serve a notice on Durga Churn to at once cease from building the hut under section 518, Criminal Procedure Code, and call on both parties to appear before me this day week with their documents, that I may determine, under section 530, Criminal Procedure Code, who is in possession of the disputed land."

Now, in the case at present before us, there is a proceeding. The Magistrate has recorded the following words: "Whereas, from the police-report, a breach of the peace (*sic.*) probable."

It would seem that some such word as "is" or "appears" has been omitted. In a case (see *Govind Chunder Moitra vs. Abdul Syad*, ante, p. 217) which was before this Bench a few days ago, I expressed an opinion that it is the duty of the Magistrate, before taking proceedings under section 530, to record a proceeding, stating in the first place that he is satisfied that a dispute likely to induce a breach of the peace exists; and, in the second place, the ground upon which he is so satisfied; and these observa-

(1) PONTIFEX and FIELD, JJ.

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GOLAM ALI  
CHOWDHRY.*Judgment.*

FIELD, J.

tions have been now pressed before me. I certainly think that it is the duty of a Magistrate to record distinctly in cases under section 530 that which the law requires to be recorded. But, whether the omission on the part of a Magistrate to comply precisely with the requirements of the law will in every case afford a sufficient ground for setting aside his order is another matter. In the case which was recently before this Bench, a reference was made in the Magistrate's proceedings to the police-report, and I expressed an opinion that, even if the police-report were taken to be incorporated by reference in the initial proceeding, there would not be matter sufficient to satisfy the requirements of the law. In the present case, the Magistrate's proceeding, by itself, is not a sufficient compliance with the requirements of the law; but, if the police-report, to which this proceeding refers, be taken to be incorporated, there is sufficient, *first*, to show that a dispute likely to induce a breach of the peace existed, and, *secondly*, to show grounds upon which the Magistrate might reasonably be so satisfied. I am distinctly of opinion that a Magistrate who records a proceeding like that which has been recorded in the present case performs his duty in a perfunctory and unsatisfactory manner, but I am not prepared to say that the final order in the present case is defective on the ground that the initial proceeding did not contain within itself all which the law requires to be recorded, but that we have to look to the police-report in order to find matter sufficient to satisfy the requirements of the section. On this first ground, then, it appears to me that the objection taken by the learned Counsel must fail. As to the *second* ground, that, namely, connected with the boundaries, there is, in all probability, a sufficient description, regard being had to the nature of the land which formed the subject of dispute, and to the difficulty of giving precise boundaries of chur land; but it is not necessary to go further into this question, because the order of the Magistrate ought, in my opinion, to be set aside on the remaining ground, which I am about to deal with. This ground is, that there was not evidence of possession before the Deputy Magistrate to justify his order; that he has allowed his mind to wander away from the question of possession, which it was his duty to adjudicate upon; and that his order is based entirely upon the view which he has taken with respect to title.

I have read through the evidence of the witnesses examined on behalf of the petitioner before the Magistrate, and it appears to me that this rule ought to be made absolute upon the grounds so taken. Section 530 of the Code of Criminal Procedure enacts that the Magistrate shall, without reference to the merits of the claims of any party to the right of possession, proceed to inquire and decide which party is in possession of the subject of dispute. Now it has been contended before us that the proper meaning to be placed upon these words is, that the Magistrate is entirely precluded from receiving any evidence whatever as to the title of the parties. In that argument I do not concur. That possession should follow title is a reasonable and natural presumption; and, if a Magistrate, in a case of this kind, uses evidence of title, merely in order to guide and assist his mind in coming to a decision upon the question of possession, it appears to me that he is not transgressing the provisions just quoted by using evidence of title for this limited purpose; but, if, instead of proceeding to decide as to the actual possession, he virtually puts aside the consideration of this question, and determines the question of title alone, then I think he is clearly doing that which the law has forbidden him to do. In the present case, the Deputy Magistrate, in the commencement of his judgment, says that the parties were called upon to show their respective claims to it, *i. e.*, the *chur*. He does not say that they were called upon to show their respective claims to possession. He then proceeds to enter into the question of title, to consider the circumstances under which the *chur* came into existence, and to give reason for thinking that this newly-formed *chur* is part of the estate of one party rather than of the estate of the other party. Having devoted a considerable portion of his judgment to the question of title, he then proceeds to deal with the question of possession. He commences this part of his judgment by saying: "Now, to show possession, Baboo Kali Krishto Thakur's men have examined several witnesses, one of whom is a Munsif's peon." He then deals with the evidence of the witnesses called to prove the distraint-proceedings which he believes to be fictions; and finally he says: "I lay not much stress on the deposition of such witnesses. As the circumstance and probability go in favour of Munshi Golam Ali and as (to?) what I have stated in paragraph 2 of this decision, the disputed land lies

[CRIMINAL.]

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*Judgment.*

FIELD J.

beyond Jahazmara, and is adjoined to chur Punchkati, and, as I believe it is in Golam Ali's possession, I direct that the disputed land should remain in Munshi Golam Ali's possession till otherwise decided by competent Court." Here the Deputy Magistrate expressly states that he does not lay much stress upon the testimony of the witnesses; and, if we put aside this oral evidence, the other evidence before him is concerned mainly or indeed altogether with the question of title. It is therefore clear that, apart from the oral evidence upon which he did not lay much stress, there was not evidence upon which the Deputy Magistrate could determine the question of actual possession, for evidence of title, though it may supplement and support direct evidence of possession, cannot, standing alone, be proof of possession. If the oral testimony of the witnesses went to show that the possession was with Golam Ali, and if the circumstances and probabilities of the case and the evidence of title had been used merely to corroborate this testimony, there would be sufficient on the record to support the order of the Deputy Magistrate; but, on examining this oral evidence, I find that it is mainly directed to the question of title, and contains little or nothing upon the question of possession. On the whole, it is clear from the matter upon which the witnesses were examined, and from the Deputy Magistrate's judgment, that he did not properly address his mind to the question which it was his duty to try, the fact of actual possession, but did that very thing which, by the provisions of section 530, he was precluded from doing, namely, determined the case with reference to the merits of the claims of the parties to the *right* of possession.

This being so, it appears to me, the Deputy Magistrate's order under section 530 of the Code of Criminal Procedure must be set aside.

This Rule will be made absolute.

PONTIFEX, J.—I also agree that the proceedings must be set aside, and after the judgment of my learned brother, it is only necessary for me to say that, in my opinion, there was a sufficient proceeding recorded for the purpose of initiating proceedings under section 530 of the Code of Criminal Procedure. I also wish to add that, if there had been substantial evidence of possession or a con-

flict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession. But, as my learned brother has read the depositions of the witnesses, and it does not appear that there was sufficient evidence of possession, I agree that the case should not have been decided upon evidence of title alone.

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PONTIFEX, J.

## [CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF RAM CHUNDER SHAW } ... APPELLANTS.  
AND OTHERS . . . . . }

1881  
Jan. 15th.

*Act VII. (B.C.) of 1878, sections 9, 58, and 74—“Like offence” under section 74 of Act VII. (B.C.) of 1878—Presidency Magistrates Act (IV. of 1877), section 12—Previous conviction under Excise Act.*

No. 705 of  
1881.

To constitute an offence under section 58 of Act VII. (B.C.) of 1878, it is necessary that the accused should, without a special license from the Collector, have introduced, or attempted to introduce, for sale, spirituous liquors manufactured at another place within limits which have been fixed under section 9 of the Act, for the consumption of liquors manufactured at a distillery established within such limits.

The words “like offence” in section 74 mean any offence under the Act punishable with a fine of Rs. 200 or upwards—not necessarily the “same offence.”

**A**PPEAL from a decision passed by one of the Presidency Magistrates of Calcutta.

*Allen*, for the Appellants.

*Phillips* (Standing Counsel), for the Crown.

The facts and arguments appear from the following judgment of the High Court (1), which was delivered by—

(1) MORRIS and PRINSEP, JJ.

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Judgment.

PRINSEP, J.

PRINSEP, J.—The three appellants before us, as well as two others, have been convicted and sentenced under section 58 of the Bengal Excise Act, VII. (B. C.) of 1878, and in addition to the penalty prescribed thereby, they have, under section 74, been sentenced to imprisonment in consequence of their having been previously convicted of an offence under the Act punishable with a fine of Rs. 200 or upwards.

The Presidency Magistrate has recorded on the proceedings of the trial that he has “not the least doubt that the defendants (with the exception of Husnoo, who has been discharged) did introduce spirituous liquors without a pass, and have committed an offence under section 58 of the Excise Act.”

To constitute an offence under the latter part of section 58, it is necessary that the offender shall have introduced, or attempted to introduce, for sale, spirituous liquors manufactured at another place into the limits fixed for the consumption of such liquors manufactured at such distillery (*i. e.*, a distillery established under section 9) without a special pass from the Collector.

In the present case, we find that there is some evidence, which apparently the Magistrate has believed, to show that the liquor seized in Calcutta had been manufactured in Tollygunge, a suburb. Under the circumstances it is not necessary for us to express any opinion on the value of that evidence. But Mr. R. Allen, for the appellants, has maintained, and the Standing Counsel for Government, who appeared to support the conviction, has ultimately admitted, that the Collector of Calcutta, up to the present time, has not, under section 9, fixed limits with regard to any distillery in Calcutta within which no spirituous liquor manufactured after native processes, except in that particular distillery, shall be introduced or sold without a special pass. There cannot, therefore, be the special protection necessary to constitute an offence under section 58, and the conviction and sentences passed on the appellants must accordingly be set aside.

Two other persons have been convicted simultaneously with the appellants who have not been able to appeal, their sentences not being appealable; we have already held that no offence has been committed, and we therefore feel bound to deal with their cases under section 147 of the High Courts' Criminal Procedure Act. The Standing Counsel, on behalf of Government, consents to our proceed-

ing summarily with this matter without complying with the special procedure provided by section 181 of the Presidency Magistrates Act, and as this would necessitate a mere compliance with form without any possible advantage, we direct that the convictions and sentences passed on these two men, Obinash Chunder Shaw and Baneshur Shaw, be set aside. The fines, if paid, will be refunded, and the appellants will be released from jail.

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In re RAM  
CHUNDER  
SHAW.  
—  
Judgment.  
—  
PRINSEP, J.

It is right that we should notice two objections taken in this appeal to the legality of the sentences passed. Mr. Allen first contended that, in order to render an offender under the Bengal Excise Act liable to additional punishment under section 74, it is necessary that he should have been previously convicted of the *same* offence, the words "*like offence*" being synonymous with *same offence*. It appears to us, however, that the section contemplates merely that the offender, having been already convicted of an offence punishable with fine of Rs. 200 or upwards, should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term *like offence*. The additional sentence of imprisonment passed under section 74 would not be illegal if, in the case now before us, an offence had been established under section 58.

The other objection is, that the alternative sentence of imprisonment, *viz.*, three months' rigorous imprisonment in default of payment of the fine imposed, is beyond what the Magistrate can inflict under section 12 of the Presidency Magistrates Act, IV. of 1877. Mr. Allen contends that, as, under section 74 of the Bengal Excise Act, the appellants were liable to imprisonment for a term not exceeding 6 months, the Magistrate, under section 12 of the Presidency Magistrates Act, could not sentence them to undergo imprisonment for more than six weeks, *i. e.*, one-fourth of six months, on default of payment of the fine imposed.

It appears to us, however, that the appellants have been sentenced practically to two sentences—one under section 58 to fine of rupees one hundred each, in default to undergo three months' rigorous imprisonment each, and the other under section 74, in addition to the penalty under section 58, to imprisonment each for six months. The imposition of the additional sentence would not affect the



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*In re*RAM  
CHUNDER  
SHAW.*Judgment.*  
PRINSEP, J.

Magistrate's power as regards the original sentence under section 58. It cannot be denied that, standing by itself, the sentence under section 58 is perfectly legal; but it is contended that, by reason of the additional sentence of imprisonment under section 74, the term of imprisonment in default of payment of the fine imposed under section 58 is excessive, and therefore illegal. We see no valid reason for this contention, and indeed it would be an anomaly if a sentence perfectly legal under section 58 should become otherwise, because the offender had rendered himself liable to an *additional* punishment on account of a previous conviction under the Bengal Excise Act.

We observe that this case was heard by the Magistrate on the 6th, 9th, and 16th November, though it was of a nature which should ordinarily have permitted of its decision at the first hearing. No reason is assigned for the postponements, nor is it stated that they were owing to the absence of the necessary evidence for the prosecution. We think it necessary to notice this, because frequent postponements add considerably to the expense incurred by the parties, and should be avoided.

We observe also that in the affidavit it is stated on behalf of appellants that application was made to the Magistrate for copies of the evidence in this case; but the same was refused notwithstanding the terms of section 170 of the Presidency Magistrates Act.

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## [CRIMINAL REFERENCE.]

MUNI CHUNDRA

AND

HARIRAM AHOM

*Act XIII. of 1859, section 2—Artificer—Workman—Labourer.*

A mahout or elephant driver does not come within the provisions of Act XIII. of 1859.

1881  
Mar. 31st.

c  
No. — o  
175  
1881.

REFERENCE submitted by the Deputy Commissioner of Sib-sagar, Assam, dated the 21st March 1881.

The circumstances were as follow :—

A complaint was made under section 2 of Act XIII. of 1859 against a mahout on the ground that he had entered into a contract with the complainant to serve him for three years as an elephant mahout.

The Assistant Commissioner exercising powers of a Magistrate of the 1st class, and who has been especially empowered to try cases under Act XIII. of 1859, convicted the accused under section 2 of that Act, and, in default of finding security, sentenced him to six weeks' rigorous imprisonment.

The Deputy Commissioner was of opinion that the accused in this case was a domestic servant, and that, therefore, he should not have been tried under Act XIII. of 1859, and, upon this ground, he considered the order of the lower Court should be set aside.

He relied on the case of *In the Matter of Domestic Servants*, 3 B. L. R., App. Cr., 32.

The opinion of the High Court (1) upon the reference was as follows :—

We think, with the Deputy Commissioner, that a mahout or elephant-driver does not come within the provisions of Act XIII. of 1859.

We set aside the order purporting to have been made under the provisions of that Act, and direct the release of Hariram Ahom.

(1) PONTIFEX and FIELD, 77.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF THE EMPRESS

AND

SALIK ROY.

1881  
Jan. 15th.  
No. T. b. 1.

*Penal Code (Act XLV. of 1860), section 211—False charge before Police—Complaint before Magistrate—Police Reports—Procedure.*

Where a charge made to the police is found by that body to be false, there being no complaint made to the Magistrate, it is not necessary, before a prosecution under section 211 of the Indian Penal Code can legally be instituted against the person making the charge, that the charge should be first judicially investigated.

*Empress v. Abdul Husan*, I. L. R., 1 All. 497, followed.

*In the Matter of Riyogi Bhagut*, 4 C. L. R. 134, distinguished.

REFERENCE submitted by the Officiating Sessions Judge of Sarun on the 18th December 1880 under the following circumstances:—

Salik Roy, it appears, sent information to the police through the chowkidar, charging certain persons with setting fire to his house, and he repeated the charge to the police-officer who went to his village to investigate the case. In the end, the police reported the case to be a false one. The Magistrate at once directed the prosecution of Salik Roy for giving false information without calling upon him or giving him any opportunity to prove his case. Salik Roy was thereupon committed to the Court of Session for trial under the provisions of section 211 of the Indian Penal Code for knowingly instituting a false charge with intent to injure the persons whom he accused.

The Sessions Judge was of opinion that the commitment was illegal; and accordingly forwarded the record to be laid before the Court in order that the commitment may be quashed.

The judgment of the High Court (1) was as follows :—

This is a reference from the Judge of Sarun, asking us to quash a commitment. The ground upon which we are asked to do so is, that the accused, who is charged with an offence under section 211 of the Penal Code, should not have been committed for trial until the complaint which he made had been judicially inquired into, and the Judge refers to a case decided by this Court, which, he considers, applies to the present case.

1881  
In re  
EMPRESS  
v.  
SALIK ROY.  
Judgment.

If the case referred to by the Sessions Judge is the case of *Biyogi Bhagut*, convicted by his predecessor on 30th December 1878, reported 4 C. L. R. 134, we may point out that it is not in all respects similar to the present case. In that case, the complainant, dissatisfied with the police investigation and report, made a complaint to the Magistrate which was dismissed without hearing his witnesses.

We do not find in the record that there was any complaint made to the Magistrate in this case, but, on the report of the police that the case was false, that the prosecution of the complainant was set on foot.

We are unable to say that there is anything illegal in the proceedings, and we are supported in this view by the case of *Empress v. Abdul Husan*, I. L. R., 1 All. 497. We are not aware of any recent ruling of this Court of a contrary tenor.

We must therefore refuse to quash the commitment on the ground on which the Judge's recommendation is based.

• • (1) MITTER and MACLEAN, 77.

1881

MODUN  
MOHUN  
GHOSH  
H. AZRA  
v.  
B. J. RODA  
SONDORI  
DASIA.

*Judgment.*

On the whole we are of opinion that the auction-sale of the disputed property held by the Moonsiff of Doobrajapore should not be set aside.

We accordingly reverse the decree of the Lower Appellate Court, and restore that of the Moonsiff with costs in all the Courts.

## [ CRIMINAL JURISDICTION. ]

EMPRESS

AND

SHIBO BEHARA.

1881  
Jan. 20th.

No. 121 of  
1880.

*Penal Code (Act XLV. of 1860), section 211—Complaint before Magistrate—False charge before police—Police reports—Sanction to prosecute—Procedure.*

A sanction, for a prosecution under section 211 of the Indian Penal Code, given without all the witnesses, whom a complainant wishes to produce, being heard in Court, is illegal.

*In the Matter of Chukradar Potti, post, p. 289, followed.*

REFERENCE under section 296 of Act X. of 1872. The circumstances, as stated in the Order of Reference, were as follow:—

The accused, on the 1st October 1880, at Napo Police Outpost, accused Bali Jama and others of arson under section 436 of the Penal Code. The police took up the inquiry, and, after some time, reported it false, and the Magistrate thereupon sanctioned a prosecution under section 211, Indian Penal Code. Previously to this order, however, the accused, Shibo Behara, had presented a petition asking for a judicial inquiry. This petition does not seem to have been disposed of, and the accused certainly did not get what he asked, and what he had a right to ask for. The case was sent to a Deputy Magistrate for inquiry, and that officer committed it to the Court of Session. At the Sessions accused pleaded not guilty, and objected to being tried on the ground that he had been seriously and lawfully prejudiced by the failure to grant him the judicial inquiry he asked for.

The following cases were referred to, *viz.* :—

*Bishoo Barik*, 16 W. R. 77; *Bilash vs. Makroo*, 2 B. L. R., Short Notes, 15; *Nusibunnissa vs. Sheikh Erad Ali*, 4 C. L. R. 413; *Sheikh Erad Ali vs. Nusibunnissa*, 4 C. L. R. 534; *Empress vs. Karimdad*, 7 C. L. R. 467.

1881  
EMPRESS  
SHIBO  
BEHARA.  
Judgment.

The following judgments were delivered by the High Court (1) :—

MITTER, J.—Whether the Judge was right or not in postponing the trial after it had once begun, I think this Court has the power to quash an illegal commitment at any stage of a criminal proceeding.

MITTER, J.

In these two cases I am of opinion that the commitment should be set aside on the ground that the sanction for prosecution under section 211 was illegally given. Whatever might have been said in *Nusibunnissa vs. Sheikh Erad Ali*, 4 C. L. R. 413, the later cases have distinctly laid it down that a sanction, for prosecution under section 211 given without hearing all the witnesses whom a complainant wishes to produce in Court, is illegal. In these cases, therefore, the original orders sanctioning prosecution under section 211 are illegal. That being so, the commitments are also illegal. I would therefore set them aside as recommended by the Judge.

MACLEAN, J.—The principle involved in these cases is the same as those involved in the case of *Chuckradar Potti*, post p. 289, just disposed of, and, as I am of opinion that any conviction had upon the trials under the commitments which we are asked to quash would be set aside, I think the simplest course is to set aside the proceedings at this stage.

MACLEAN, J.

(1) MITTER and MACLEAN, JJ.

## [ CRIMINAL JURISDICTION. ]

1881.  
April 6th.  
—  
No. 2 of  
1881.

IN THE MATTER OF GYAN CHUNDER ROY ... PETITIONER.

*Criminal Procedure Code (Act X. of 1872), sections 147 and 470—Penal Code (Act XLV. of 1860), section 211—Dismissal of complaint without examination of witnesses of complainant—Sanction to prosecute under section 470 of Criminal Procedure Code.*

A Magistrate, before whom a complaint had been made, after examining the complainant, but without examining his witnesses, dismissed the complaint under section 147 of the Criminal Procedure Code.

Shortly afterwards the person accused applied to the Magistrate, and obtained sanction, under section 470 of the Criminal Procedure Code, to prosecute the complainant under section 211 of the Penal Code, and proceedings were thereupon commenced before another Magistrate, who subsequently committed the original complainant to the Court of Session. No application was made that a further inquiry might be made notwithstanding the order of dismissal.

*Held* that the proceedings in the original complaint had been terminated in a regular manner, and therefore the order sanctioning the prosecution was not illegal by reason of the Magistrate not having examined the witnesses of the complainant.

*Syed Nissar Hossein vs. Ramgolam Singh*, 25 W. R., Cr., 10, dissented from.

**M**OTION to set aside an order passed by the Officiating Magistrate of Dacca dated the 18th November 1880, and an order passed by the Officiating Joint-Magistrate of Dacca dated 20th December 1880.

In this case the petitioner, Gyan Chunder Roy, on the 11th November 1880, lodged a complaint before the police against Protap Chunder Dass for assaulting and striking him with a stick in the preceding evening, in consequence, he alleged, of his having refused to submit to the inducements offered by Protap Chunder Dass for the purpose of committing an unnatural offence.

On the same day, the Sub-Inspector of Police examined several witnesses offered by the petitioner as well as the accused Protap Chunder Dass, and, being of opinion that the latter had committed the offence complained of, enlarged him on bail to appear before the Magistrate.

1881  
In re  
GYAN  
CHUNDER  
ROY.  
Statement.

On the 15th, the Assistant Superintendent of Police held a fresh investigation into the case, but examined only three persons out of several produced by the petitioner. He also examined the accused Protap Chunder Dass, and, in the end, pronounced the complaint to be false.

Thereupon a formal complaint was preferred by the petitioner to the Magistrate on the 17th.

On the day following, the Magistrate examined the petitioner, and, without taking the evidence of any of the witnesses mentioned in the petition of complaint of the 17th November, dismissed the complaint at once, and, in his judgment, stated that the accused Protap Chunder Dass was bound to prosecute the petitioner for instituting a false complaint, and for defamation.

Accordingly, on the 1st December, Protap Chunder Dass applied to the Magistrate for sanction to prosecute for making a false complaint and for defamation, and sanction was granted, and the prosecution instituted.

On the 20th December, the Joint Magistrate, having inquired into the case, committed the petitioner to the Court of Session for making a false charge under section 211, for giving false evidence under section 193, and for defamation under section 500 of the Indian Penal Code.

The petitioner now sought to have the orders passed by the Magistrate on the 18th November sanctioning the prosecution, and by the Joint Magistrate on the 20th December committing him to the Sessions Court, set aside as illegal on the ground that, inasmuch as this was a warrant-case, the Magistrate was not competent to dismiss the complaint without examining all the witnesses offered by the petitioner.

*Evans* and *M. Ghose* and Baboo *Doorgamohun Dass* and Baboo *Lalmohun Dass*, for the Petitioner.

*Paul* (Advocate-General) and *Branson* and Baboo *Baikant Nath Dass*, *contra*.



1881

The following judgments were delivered by the High Court (1):—

*In re*  
GYAN  
CHUNDER  
ROY.

*Judgment.*

CUNNING-  
HAM, J.

CUNNINGHAM, J.—The question raised in this case is the competence of a Magistrate, under section 147 of the Criminal Procedure Code, to dismiss a complaint, and, under section 468 of the Code, to sanction the prosecution of the complainant for making a false charge without hearing the complainant's evidence.\*

I see no reason to question the legality of the Magistrate's proceeding. Section 147 empowers the Magistrate to dismiss the complaint if, after examining the complainant, there is, in his judgment, no sufficient ground for proceeding; and there is nothing in section 468 to indicate that any particular proceeding on the part of the Court giving the sanction is essential to its validity, such as, for instance, is necessary in the case of a Court committing a case, or sending it for inquiry under section 471. I am unable to concur in the opinion expressed on this point in the case of *Syed Nissar Hossain vs. Ramgolam Singh*, 25 W. R., Cr., 10. The application must be rejected.

PRINSEP, J.

PRINSEP, J.—The petitioner Gyan Chunder Roy made a complaint to the police which, after investigation, was reported to the Magistrate as false. He then repeated his complaint before the Magistrate, who examined him under section 144 of the Code of Criminal Procedure, and dismissed the complaint under section 147. A fortnight later the person accused applied to the Magistrate, and obtained sanction to prosecute the complainant for having falsely charged him. Proceedings were thereupon commenced before another Magistrate who, on the 20th December, committed the petitioner to the Court of Session. The petitioner has now applied to this Court to have the order dismissing his complaint set aside, and the order sanctioning the criminal prosecution and the proceedings taken thereunder quashed, on the sole ground that the Magistrate was not competent to dismiss the complaint or to sanction the prosecution [under section 211 of the Indian Penal Code] without first examining all the witnesses offered to prove it. Several cases decided by this Court have been cited by Mr. M. Ghose in support of this contention, but it appears to me that, with the exception of one case, that is, the case of *Syed Nissar Hossein vs. Ramgolam Singh*, 25 W. R., Cr., 10, none of them are precisely in point.

There is clearly a distinction between a sanction given under section 470 of the Criminal Procedure Code and the institution of proceedings by a Court of its own motion which is provided for by section 471. The case now before us is one coming under section 470, which refers to private prosecutions, under leave obtained, for certain offences specified in sections 467, 468, and 469. Before sanction to prosecute can properly be given, it is necessary that the proceedings on the original complaint should have terminated in a regular manner. The Court should then consider (as has been pointed out in the cases of *Reg. vs. Mahomed Hossein*, 16 W. R. 37, and *Radha Nath Banerjee*, Marshal's Rep., 407) whether there are good grounds for the application made to it, or whether it has been made solely for the purpose of oppressing and harassing an adversary, and preventing him from taking any further legal steps to which he may be entitled. As has been pointed out also in the case of the *Queen vs. Baijoo Lall*, I. L. R., 1 Cal. 450 (see page 455), "it is by no means in every instance in which a party fails to prove his case that the Judge, who has decided against such party, is justified in exercising the powers given him by this section. So long as it is a case as to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly if, the moment he has given his judgment in the civil suit, he exercises the power given him by this section. At the same time, if, in the course of the civil trial, the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, think it necessary to proceed at once, of course it may be right to do so. Judges should, however, bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also recollect that, when they proceed under section 471, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party, and merely sanctioned by the Court under section 468." In the cases cited before us, that is to say, in 16 W. R. 44, I. L. R.,

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 PRINSEP, J.

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ROY.

Judgment.

PRINSEP, J.

5 Cal. 281, and 7 C. L. R. 382, prosecutions were ordered simply on the report of the police that the complaints made had, on investigation, been found to be false. In all these cases, and also in the case of the *Queen vs. Karimdad*, 7 C. L. R. 467, decided by GARTH, C. J., and FIELD, J., on the 9th December 1880, the Court has pointed out the impropriety of acting solely on the report of the police, and without having considered the statement of the complainant or the evidence tendered by him. In the cases, *Reg. vs. Heera Lall Ghose*, 13 W. R., Cr., 37, and *Gangoo Singh*, 2 C. L. R. 389, the Magistrate had commenced to hear the evidence tendered by the complainant, and closed the proceedings summarily without hearing all the witnesses cited so as to make the order of discharge an improper order within the terms of section 215, Explanation III., of the Code of Criminal Procedure. These are cases very different from the case now before us, in which, after hearing the complainant, the Magistrate was fully competent to dismiss the complaint, and so put an end to all proceedings before him.

In the case of *Gangoo Singh*, 2 C. L. R. 389, the Magistrate ordered a prosecution for a false complaint after he had passed an order of dismissal under section 147; but, in that case, he took upon himself to direct the institution of a prosecution acting under section 471, and he was therefore, under the terms of that section, bound to make such preliminary inquiry as might be necessary before directing a prosecution to be instituted; and the Court there held that he was bound to give the complainant an opportunity of showing that there were no grounds for instituting such a prosecution. That, however, is a very different case from the present one, in which the responsibility of instituting a criminal prosecution was accepted by a private party, the proceedings on the original complaint had regularly terminated, and, from what had already taken place before him, the Magistrate was satisfied that the leave asked for should be granted.

I concur in the view of the law expressed by JACKSON, J., in the case of *Biyogi Bhagut*, 4 C. L. R. 134. In that case, however, the order was set aside on the ground that the order of dismissal under section 147 had not been properly passed, because the complainant had not been examined.

It was certainly open to the complainant, in the case now

before us, if he thought proper, to apply for an order, under section 298, that a further inquiry into his complaint might be made, notwithstanding the order of dismissal; but he did not think it proper to do so, nor has he at any time, until the lapse of some six weeks and after, on proceedings taken against him, he has been committed to the Court of Session for making a false complaint, thought proper to take any steps to have his complaint retried, or to have any witnesses examined.

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In re  
GYAN  
CHUNDER  
ROY.  
Judgment.  
PRINSEP, J.

The fact, that he has taken no action in the matter, seems to me to distinguish the present case from the case of *Syed Nissar Hossein vs. Ramgolum Singh*, 25 W. R., Cr., 10. But, even if this were not so, I am not disposed to concur in the view laid down by the learned Judges in that case when they say that it was "clearly illegal on the part of the Assistant Magistrate and Magistrate to give sanction under section 211 of the Indian Penal Code without giving the petitioner an opportunity of adducing evidence to prove that the charge which he made was "a true one."

On these grounds I am unable to find anything illegal in the proceedings which have already taken place; and I accordingly concur in discharging this Rule.

## [CRIMINAL APPELLATE JURISDICTION.]

1881  
Mar. 25th.  
No. 162 of  
1881.

ROHLIA MAHTO . . . . . APPELLANT;  
AND  
EMPRESS . . . . . RESPONDENT.

*Evidence Act (l. of 1872), sections 32 and 33—Deposition of deceased witnesses—*  
• "Issue substantially the same."

The deposition of the complainant upon a charge of grievous hurt having been taken before the Magistrate, the complainant died. In consequence of his death charges of murder and culpable homicide not amounting to murder were added before the Sessions Judge.

*Held* that the deposition of the complainant before the Magistrate was admissible in evidence before the Sessions Court under section 33 of the Evidence Act.

*Per curiam*.—By "the questions in issue" referred to in section 33 of the Evidence Act being required to be "substantially the same," it is not intended that, in a case where the person injured dies subsequently to the inquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because, in consequence of his death, other charges are framed against the accused. \* \* \* The matter depends upon whether the same evidence is applicable, although different consequences may follow from the same act.

**A**PPPEAL from a conviction and sentence passed by the Officiating Sessions Judge of Patna.

*M. P. Gasper*, for the Appellant.

*M. Ghose*, for the Prosecution.

The facts appear from the following judgment of the High Court (1), which was delivered by—

PONTIFEX, J. PONTIFEX, J.—This is an appeal from a conviction by a jury, in respect of which we can only interfere if there has been some

(1) PONTIFEX and FIELD, JJ.

error of law or misdirection by the Judge. Now, it is alleged that we ought to interfere on two grounds—*first*, that evidence has been wrongly placed before the jury; and, *secondly*, that, in certain particulars, there has been a misdirection or rather a want of direction by the Judge.

1881  
ROHLIA  
MAHTO  
v.  
EMPRESS

Judgment.

£,XEFITNOP

With respect to the first ground—that improper evidence has been placed before the jury—the complaint is, that the depositions of two witnesses who were examined before the Magistrate were improperly allowed by the Judge to be put in by the prosecution, and used in the Sessions Court under the following circumstances:—

One of these witnesses—the person whom the defendant and his party were accused of assaulting—has since died. Now, before the Magistrate, the only complaint was a charge of grievous hurt. But, in consequence of the death of the person who was hurt, *viz.*, Khedroo, other charges were added before the Sessions Judge, *viz.*, a charge of murder and a charge of culpable homicide not amounting to murder. In consequence of these additional charges, it is argued that, under section 33 of the Evidence Act, the questions in issue before the Sessions Court and before the Magistrate were not substantially the same in the two proceedings. As a matter of fact, the prisoner has only been convicted of grievous hurt, and therefore the issue that was before the Magistrate was the only issue that has been decided against the accused by the jury. It appears to us that by “the questions in issue,” referred to in section 33, being required to be “substantially the same,” it is not intended that, in a case where the person injured dies subsequently to the inquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because, in consequence of his death, other charges are framed against the accused. We are of opinion that the evidence of the deceased in this was admissible under section 33; and, even if it were not admissible under section 33, that it would be admissible under the first clause of section 33 of the Evidence Act. In considering whether the proviso to section 33 is applicable—that is, whether the questions at issue are substantially the same—it depends upon whether the same evidence is applicable although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conducted

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ROHLIA  
MAHTO

v.

EMPRESS.

*Judgment.*

PONTIFEX, J.

to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same; we therefore think that this evidence was properly admitted under section 33.

With respect to the other deposition, which was put in and read before the Sessions Court, it appears that a person named Jan Ali, alleged to be the gomashta of the ticcadar, was examined before the Magistrate, and that he lived in the cutchery-house. A summons was properly taken out to be served on Jan Ali at the cutchery-house; but the peon in his return stated that, as he was unable to find Jan Ali and serve him personally, he hung up the summons in the cutchery-house. There is also evidence to show that Jan Ali suddenly disappeared from the cutchery-house. It is further shown that inquiry was made in his native village whether he had returned there, but the result of the inquiry was, that nothing had been heard of him. It was therefore impossible to say where Jan Ali was, or to serve him with a summons. We think, under these circumstances, that his deposition was properly useable under section 33 before the Sessions Court, and it does not appear that any objection was made before the Judge to its admission. We find on the record no petition or memorandum showing that objection was made when the deposition was read; but we do find that, on the part of the defendant himself, the deposition before the Magistrate of one of his own witnesses was put in, and was used as evidence. We think, therefore, that both these depositions were properly admitted by the Judge to be used as evidence in this case.

We then come to the next ground before us, that there has been misdirection by the Judge, or rather a want of sufficient direction to the jury. It is alleged that many matters were not mentioned by the Judge in his charge which ought to have been brought to the notice of the jury; and, in particular, stress was laid on the fact that the Judge made no reference whatever to the evidence of the witnesses for the defence. We asked that the evidence of the witnesses for the defence should be read to us, and it has been read to us, and we have no hesitation in saying that the Judge, by making no reference to it in his charge to the jury, acted favourably rather than otherwise towards the prisoner. For, if reference

had been made to that evidence, it would, at the same time, have been necessary to point out to the jury that the witnesses were not in accord with one another; that their statements were discrepant; and that the evidence of the principal witness who is now relied upon for the defence was really unreliable. Moreover, we know that the prisoner was defended by Counsel in the Court below; and, although particular points may not have been alluded to in the Judge's charge to the jury, we have little doubt that they were made, and properly made, much of by the defendant's Counsel. It is therefore not to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.

There is one other objection to which it is necessary to refer, and that is an objection that is taken before us as to the constitution of the jury, but about which there is nothing in the grounds of appeal to this Court. It is stated that the foreman of the jury was a clerk in the Magistrate's office. This is the only ground, as we understand it, on which objection could be made to him. He was challenged before the Judge, and it was for the Judge to decide whether the grounds of the challenge were such that he ought not to be allowed to sit on the jury.

The Judge was not satisfied that the grounds were sufficient, nor do we see any reason why his being a clerk in the Magistrate's office should disqualify him from sitting on the jury.

Under the circumstances we must dismiss this appeal. The conviction and sentence will stand.

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MAHTO  
v.

EMPRESS.

Judgment.PONTIFEX, J.



## [CRIMINAL APPELLATE JURISDICTION.]

1881  
Jan. 20th.

No. 743 of  
1880.

IN THE MATTER OF CHUKRADAR POTTI . . . . APPELLANT.

*Penal Code (Act XLV. of 1860), section 211—False charge—Complaint before Magistrate—Investigation of charge made before police—Police reports—Procedure—Criminal Procedure Code (Act X. of 1872), section 147.*

A charge laid against certain persons before the police having been reported false by that body, the person who made the charge complained to the Magistrate of the District, who directed a fresh investigation. The charge was again reported false. The complainant thereupon filed a petition in which he alleged that the second investigation had not been properly conducted, and asked that further evidence might be taken by a specified officer.

No further investigation having taken place, the complainant was ordered to be prosecuted under section 211 of the Indian Penal Code, and, on trial, was convicted and sentenced.

On appeal to the High Court, it was *held* that the conviction was illegal, inasmuch as an opportunity had not been afforded to the accused of producing all his evidence in support of the charge made by him.

*In the Matter of Russick Lal Mullick*, 7 C. L. R. 382, and *In the Matter of Biyogi Bhagut*, 4 C. L. R. 134, followed.

*Per MACLEAN, J.*—The proper principle which should guide a Magistrate is, that, if no complaint is made before him after a reasonable time has elapsed from the conclusion of a police-inquiry, he would be justified in proceeding against a person who has made a complaint to the police which has been found to be false; but, if a complaint is made, that complaint must be dealt with judicially. It is unfair, even then, to proceed against the complainant without hearing any witnesses whom he may wish to examine.

*Per MITTER, J.*—Although a Magistrate has power, under section 147 of the Criminal Procedure Code, to dismiss a complaint without examining witnesses, yet, in such a case, no sanction for prosecution, under section 211 of the Penal Code, should be granted.

*See In the Matter of Gyan Chunder Roy*, 8 C. L. R. 267.

**A**PPPEAL from a sentence and conviction passed, under section 211 of the Indian Penal Code, by the Sessions Judge of Cuttack.

In this case the appellant preferred a charge of dacoity against certain persons.\* He alleged they had assaulted his father and himself, and had looted and carried away the property. On the night of the alleged occurrence, he lodged information at the Thana, and his statement was taken down on the following morning. An investigation was then made by the police, and the charge was reported to be false.

Upon this, the appellant complained before the Magistrate of the District, who directed a fresh investigation. Such investigation was alleged by the police to have been made, but with the same result as in the former. The appellant, however, asked that a further investigation should be made, as he alleged the officers, who had made the former investigations, had been tampered with by the other side. Thereupon, without his request having been granted, the appellant was charged under section 211 of the Penal Code, and convicted by the Sessions Judge of Cuttack.

Against the conviction, the present appeal was preferred.

The following judgments were delivered by the High Court (1):—

MITTER, J.—I think the prisoner in this case has been prejudiced by the Magistrate not having taken evidence from him in accordance with the prayer of his petition dated the 1st July 1880. It is not fair to a person to refuse to hear his whole evidence which he wishes to produce in support of his complaint, and then to order his prosecution under section 211 of the Indian Penal Code for having made a false complaint. It is true that a Magistrate has the discretion, under section 147 of the Criminal Procedure Code, to dismiss a complaint without examining witnesses, but, in that case, no sanction for prosecution under section 211 should be granted. In this country a person, when called upon to answer to a charge under section 211, will, in a majority of cases, find the greatest difficulty in substantiating even a *true* case. I think, therefore, the circumstance referred to above has materially prejudiced the appellant in making good his defence; I would therefore, on this ground alone, set aside the conviction.

(1) MITTER and MACLEAN, JJ.

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*In re*

CHUKRADAR  
POTTI.

*Judgment.*

1881

In re

CHUKRADAR  
POTTI.

Judgment.

MACLEAN, J.

MACLEAN, J.— This is one of those cases in which a person, who has been unsuccessful in proving a case before the police, has been prosecuted under section 211 of the Penal Code in spite of his endeavours to get his case judicially tried.

It appears that, on the 23rd June, the appellant, Chukradar Potti, laid information of a dacoity at the police-station. There was an investigation by the police on more than one occasion, but the case was reported false. Orders were given on 26th and 27th July for the prosecution of the appellant, Chukradar Potti.

Meanwhile he had, on the 1st July, complained that the police had sided with the zemindar, and had not made a proper investigation, and he requested that further investigation might be made by a specified officer, and that *evidence might be taken before him*.

I have been unable to discover that he was ever examined as directed by section 144, Criminal Procedure Code, or that he was ever allowed to give any evidence before he was brought before the Magistrate and the charge against him inquired into.

I have recently expressed my opinion that the course adopted in this case is one which is eminently unfair to the person complaining of his ill-success before the police. I see no difference between this case and the case I refer to—*In the Matter of Russick Lal Mullick*, 7 C. L. R. 382—and the case of *Biyogi Bhigut*, 4 C. L. R. 134, gives effect to a similar opinion.

The proper principle which, in my opinion, should guide a Magistrate is, that, if no complaint is made before him after a reasonable time has elapsed from the conclusion of a police-inquiry, he would be justified in proceeding against a person who has made a complaint to the police which has been found to be false; but, if a complaint is made, that complaint must be dealt with judicially. I consider that it is unfair, even then, to proceed against the complainant without hearing any witnesses whom he may wish to examine.

I concur in setting aside the conviction.

## [CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF MAYADEB GOSSAMI . . . . APPELLANT.

• 1881  
Feb. 22nd.  
—  
No. 66A.

*Perjury in respect of evidence in a Civil Court—Evidence Act (I. of 1872), section 91—Deposition of witness—Civil Procedure Code (Act X. of 1877), sections 182 and 183—Admissibility of deposition of witness in trial against him for perjury.*

The deposition of a witness in a civil suit taken down in a language other than that in which the evidence was given is not admissible in evidence in a prosecution against him for perjury in respect of the statements made by him unless the provisions of sections 182 and 183 of the Civil Procedure Code, Act X. of 1877, have been complied with.

**A**PPEAL from a conviction and sentence passed under the circumstances appearing below in the judgment of the High Court.

Baboo *Boikunt Nath Dass*, for the Appellant.

The judgment of the High Court (1) was as follows :—

The prisoner in this case applied for a certificate under Act XL. of 1858 in respect of the estate of two infants, and, in support of his application, he gave a sworn deposition on 4th October last before the District Judge.

His deposition was made in Assamese, and was translated by the Serishtadar of the Court, and the Judge recorded it in English. He did not sign it, nor was it read over to the witness or translated. The requirements of sections 182 and 183 of the Civil Procedure Code were therefore not complied with. This is clear from the deposition of the Serishtadar before the Deputy Commissioner at the conclusion of the proceedings in his Court. The Judge considered that the prisoner had given false evidence, and he directed that he should be prosecuted. This has resulted in his conviction; and, as this Court was of opinion, on the facts brought to its notice, that

(1) CUNNINGHAM AND MACLEAN, JJ.

[CRIMINAL.]

C. L. R. 85.

1881

*In re*MAYADEB  
GOSSAMI.*Judgment.*

the appeal ought to be tried by the Judge before whom the false evidence was given, the appeal has been called up to this Court.

It is contended for the defence that the informalities which took place in recording the accused's deposition render the record of his evidence inadmissible, and that, under section 91 of the Evidence Act, no other evidence of his deposition is admissible.

We consider this contention sound. By section 647 of the Civil Procedure Code, the procedure prescribed by the Code is to be followed, as far as it can be made applicable, in all proceedings in any Court other than suits and appeals. By section 178 a party to a suit required to give evidence is governed by the rules as to witnesses; sections 182 and 183 therefore applied to the accused's deposition, and, these sections not having been complied with, the record is inadmissible.

The conviction must therefore be quashed, and the prisoner released.

The record of the proceedings before the District Judge do not show that the Serishtadar was sworn or affirmed as required by Act X., 1873, section 5 (b). The Judge's attention should be drawn to this, and a copy of this judgment furnished to him from this Court.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF SHEIKH FAIZ ALI AND } ... PETITIONERS.  
 OTHERS . . . . . }

1881  
 Mar. 29th.

No. 64 of  
 1881.

*Criminal Procedure Code (Act X. of 1872), section 218—Witnesses of prosecution,  
 Recall and cross-examination of—Procedure where accused desires to recall and  
 cross-examine witnesses of prosecution.*

The right of an accused person to recall and cross-examine the witnesses of the prosecution under section 218 of the Code of Criminal Procedure must be exercised at the time when the charge is read and explained to him under the preceding section and, if not exercised at that time, it cannot afterwards be insisted on although, it is in the discretion of the Magistrate to recall the witnesses if he think fit.

**R**ULE to show cause why a conviction and sentence passed by the Deputy Magistrate of Mymensingh, and confirmed by the Magistrate of the District on the 24th January, should not be set aside.

In this case the Deputy Magistrate of Mymensingh, on the 17th December 1880, upon the complaint of one Koronidi, and after having examined the witnesses for the prosecution, drew a charge under section 342, Indian Penal Code, against the accused.

On the following day an application was made on petition to the Court on behalf of the accused, praying that they might be allowed to recall and cross-examine the complainant and his witnesses under section 218, Criminal Procedure Code.

The Deputy Magistrate thereupon passed an order on that petition, which was filed on the 18th December, that the matter should be brought up on the following day for orders.

On the 20th December 1880, one of the witnesses for the prosecution, the constable who investigated the case, appeared before the Court, and the Deputy Magistrate, at the request of the Head Police Constable, directed the mooktear of the accused to cross-examine him on that day in order to avoid the inconvenience of the constable having to appear on another day. The mooktear declined to cross-examine him on that day on the ground that he was not

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In re

SHEIKH

FAIZ

ALI.

Judgment.

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prepared to do so, as the pleader of the accused was not present, and also because it might prejudice the defence if all the witnesses were not brought up at once for cross-examination; and, by a petition dated the 20th December, he asked that some future day might be fixed for the cross-examination.

The Deputy Magistrate declined to recall the other witnesses for the prosecution on the ground that they had already been cross-examined during the first hearing, and proceeded to pass judgment, and, finding the accused guilty under section 342, Indian Penal Code, sentenced them to four months' rigorous imprisonment and a fine of Rupees 20 each.

The Magistrate of the District, by his order dated the 24th January 1881, confirmed the order and sentence of the Deputy Magistrate.

He held that the accused were precluded from recalling the witnesses for the purpose of cross-examination by reason of their not having asserted their right under section 218 at the proper time.

A Rule was applied for and obtained from the High Court, calling upon the Crown to show cause why the conviction and sentences should not be set aside on the ground that the Deputy Magistrate was wrong in convicting the accused without allowing them an opportunity to recall and cross-examine the complainant and his witnesses under section 218 of the Criminal Procedure Code.

*Baboo Greesh Chunder Chowdhry*, in support of the Rule.

*Baboo Jey Gobind Shome*, *contra*.

The following judgments were delivered by the Court (1):—

PONTIFEX, J.

PONTIFEX, J.—This Rule was moved for and granted by us on the ground that the Deputy Magistrate had improperly refused to allow the petitioners to recall and cross-examine the witnesses of the complainant after the charge had been framed under section 217. The same objection was taken in appeal before the Magistrate, and the Magistrate, in his decision, has held that the petitioners did not exercise their right, under section 218, of recalling the witnesses for the prosecution for cross-examination, within proper time, and that therefore they were not now entitled to take any objection on account of the refusal by the Deputy Magistrate to recall such witnesses.

Now, in the petition before us, it is stated that the charge was drawn up on the 17th of December 1880, and that, *on the same day*, an application was made to the Deputy Magistrate asking that the witnesses should be re-called for further cross-examination. It appears, however, that the petition before the Deputy Magistrate asking that the witnesses should be re-called, although dated on the 17th December 1880, could not have been filed before the 18th December 1880, the date on which the stamp was punched and the date on which the endorsed order was made. It appears that, early in December, the witnesses, both for the complainant and for the accused person, had been examined and cross-examined, and, on the 17th December, the charge was drawn up, and the Deputy Magistrate made this order: "To-day, having heard the pleaders and mooktears, the case will stand over until to-morrow." The ordinary inference would be that the pleaders and mooktears having been heard, the case had closed, and only awaited the decision of the Deputy Magistrate. But, however that may be, the only rights that the accused person had were under section 218 of the Criminal Procedure Code. Now, under section 217, the charge is to be read and explained to the accused person, who is to be asked whether he has any defence to make. That was done on the 17th December. Under section 218, if the accused, has any defence to make, he is to be called upon to enter upon the same, and to produce his witnesses, and is to be allowed to re-call and cross-examine the witnesses for the prosecution. These two sections coming together, it seems to us that it was intended that, if the accused person desired to re-call and cross-examine the witnesses for the prosecution, the time at which he should express such desire was when the charge was read over to him, and he was called upon to make his defence. That was done on the 17th December. The petition to re-call these witnesses was not put in until the 18th. Therefore we think that it was no longer in the power of the accused person to insist upon his right of re-calling these witnesses, although it remained in the discretion of the Deputy Magistrate to re-call them if he thought fit. Now, on the 18th December, he made another order directing that the case should come on again on the 20th; and, on the 20th, an order was drawn up, but not signed, directing that the witnesses should be produced

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—  
In re  
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FAIZ  
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—

Judgment.

PONTIFEX, J.



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ALI.

Judgment.

PONTIFEX, J.

for re-examination on the 28th. The Deputy Magistrate never signed that order, for, before he was prepared to sign it, one of these witnesses for the prosecution, a policeman, who happened to be in Court, was produced, and it was asked on-behalf of the prosecution that, if the accused person wanted to cross-examine this witness, he should do so at once. The accused refused to cross-examine him then, alleging that it would prejudice his case unless all the witnesses were cross-examined together. The Deputy Magistrate then considered that the application for cross-examination was made only with the object of delaying the proceedings, and that it was not a *bonâ-fide* application; and, it being under the circumstances in his discretion to re-call the witnesses or not, and the accused having lost his rights under section 218, the Deputy Magistrate decided that he would not sign the order drawn up, and he proceeded to dispose of the case.

The Magistrate, on the appeal before him, considered that the Deputy Magistrate had acted with propriety, and we are disposed to agree with the Magistrate in that opinion. We think that there is not sufficient ground for this application, and that the Rule must be discharged.

FIELD, J. • FIELD, J.—I only desire to add that the vernacular record shows that “the vakeels and mooktears,” that is, as I understand, the vakeels and mooktears of both sides, were examined on the 17th. Now, though the Code of Criminal Procedure contains no express provisions similar to those to be found in the Civil Procedure Code as to the time at which, or the order in which, the pleaders and mooktears for the prosecution or for the defence, shall address the Court, still, according to Mofussil practice, the usual practice on this point is followed. I therefore understand from the vernacular record that the pleader or mooktear of the accused had addressed the Court, and that the pleader or mooktear of the prosecution had been heard in reply. This being so, I take it that the case was closed on the 17th, and the accused, not having exercised the right given them by section 218 at the time at which they ought, if they intended to exercise it, to have expressed their intention of doing so, I think they could not afterwards claim to exercise that right.

## [CRIMINAL JURISDICTION.]

CHUNDER SIRCAR AND OTHERS . . . . . APPELLANTS;  
 AND  
 EMPRESS . . . . . RESPONDENT.

1881  
 April 2nd.

No. 756 of  
 1880.

*Evidence Act (I. of 1872), section 50—Statement made in absence of accused—  
 Confession.*

In a case of riot which resulted in the death of one person and serious injury to others from gun-shot wounds, the persons implicated were tried together before the Sessions Judge, who adopted the following procedure: He examined the prisoners one by one, requiring the others to withdraw from the Court until their respective turn for examination came round, and, principally upon statements thus obtained in their absence, he convicted all the prisoners.

*Held* that the Sessions Judge had, in adopting such procedure, acted in a manner directly opposed to the rule that no one should be condemned upon statements made in his absence, and therefore that all statements thus made by any of the prisoners in the absence of another must be put out of consideration so far as they affect the latter.

**A**PPEAL from convictions and sentences passed by the Sessions Judge of Pubna.

The facts are very fully stated in the judgment of the High Court.

*M. P. Gasper* and Baboo *Grish Chunder Chowdhry*, for the Appellants.

The judgment of the High Court (1) was as follows:—

This is a case of riot which resulted in the death of one Gopeenath Manjee, permanent injury to the right arm of Korim Sheikh caused by gun-shots, and minor injuries to others also caused by gun-shots, and by cutting weapons.

The Sessions Judge, in concurrence with both the Assessors, has convicted Chunder Sircar, Alum Poramanick, Nundo Manjee, and

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 CHUNDER  
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 v.  
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 Judgment.

Hakim Poramanick, of riot under section 148, Penal Code, but, differing from the assessors, he has also convicted Chunder and Nundo Manjee of culpable homicide not amounting to murder, and he has sentenced Chunder Sircar to transportation for life, and Nundo Manjee to transportation for ten years; and Alum Poramanick and Hakim Poramanick to rigorous imprisonment for three years.

Concurring with one assessor, but differing from the other, the Sessions Judge has further convicted Malu Sheikh, Modon Sheikh, Mudée Sheikh, and Kalimuddeen Patan of riot, but he has, differing from both assessors, also convicted the last-named of culpable homicide not amounting to murder, and he has sentenced Kalimuddeen Patan to transportation for life, and the other three persons to three years' rigorous imprisonment. Two other men were acquitted by the Sessions Judge.

Appeals have been preferred against all these sentences.

The appellants have been defended by Mr. Gasper, both in the Sessions Court and before us, and we are surprised to find that, in a case of such public importance, and of so serious a character, the Legal Remembrancer has not been instructed to appear on behalf of the prosecution.

It appears that disputes have been existing for some time past in the village of Tepri between two parties claiming to receive rents from the ryots, the one party being certain Sandyals of Solop, Kali Sunder Sandyal and another, and the other party one Debi Dass, the auction-purchaser of the rights and interests of Bykánt Sandyal, brother to the Sandyals of the first party. Before this occurrence, Dēbi Dass died, but his interest is represented by his son Jibun Ram. The existence of these disputes and the likelihood of their terminating in a serious riot was well known to the local police, whose station is  $2\frac{1}{2}$  kos or 5 miles distant from Tepri, and so late as the morning of the riot which forms the subject of the present trial, the head constable left the place on completion of an investigation into an offence which arose out of the disturbed state of the village. The evidence shows that both sides had then assembled forcibly to assert their respective claims, and foreign clubmen (deshwalis) had been enlisted to overawe the villagers, and, in the event of a disturbance,

to give to their respective sides the benefit of their superior strength and skill.

Under his purchase in 1283 or 1876 of the rights and interests of Bykant Sandyal, Debi Dass claimed the entire (16-anna share of the) rents of the village. The other Sandyals opposed him, alleging that the interest of Bykant Sandyal was only a small fractional share not exceeding one anna. The villagers generally had yielded to the claim of Debi Dass, but a certain number of men of the fisher class inhabiting the quarter called Manjeepara refused to pay him the rent demanded of them, and were supported and encouraged in their resistance by the Sandyals. The Zemindary Cutchery of Debi Dass was held at the house of Nundo Manjee close to the Manjee's quarter, and a fence had been set up barring the passage into the homestead of Dusruth and Subul Manjee at the head of the path which runs west and north of Nundo Manjee's homestead. The object of this was apparently to protect the Manjees against any sudden attack from the Cutchery quarter. These facts must have been patent to the head constable, who was in Tepri on the morning of the riot, and it is impossible to believe that they were not also known to the superior police-officers at the adjoining police-station. It is matter therefore of extreme surprise that they did not take strict measures to prevent the breach of the peace that was evidently imminent, or at any rate to hinder the introduction of firearms and large bodies of "deshwalis" into the village. This negligence on their part has deprived this Court of independent testimony, and made it extremely difficult to ascertain from the garbled accounts of the partisans of either side what the real facts connected with the origin of this riot are, or to say which party took the initiative. We gather, however, from the evidence that, on the 10th July 1880 (Asar 27th, 1287), Chunder Nath Sircar held open Cutchery under a *gabtree* close to the house of Nundo Manjee which had been set apart for a Cutchery, and began collecting rent from the villagers on the part of Debi Dass.

An attempt was evidently made to collect the rent from the residents of the Manjeepara close by, and this was at once met by an attack in force by the Manjees aided by deshwalis of the Sandyals who were either stationed in the house of Gopal Manjee, or in the neighbouring house of Bhagiruth Thakur. The houses of

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 CHUNDER  
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 v.  
 EMPRESS.  
*Judgment.*

Gopee Manjee, Dusruth, and Subul, which were in one cluster, became the scene of the disturbance, and almost immediately a large body of men on both sides assembled there, and began the fight. One or more guns were discharged at the Manjees resulting in the wounding of Gopeenath Manjee, Kaim Sheikh, and Dhonai. Gopeenath died in hospital on the 13th from peritonitis caused by this injury, and Kaim has been permanently deprived of the use of his right arm. It would seem that they were standing in the lane near the bamboo fence. There is much discrepancy in the evidence regarding the number of shots fired, and by whom they were fired, but it is clear from the nature of the injuries inflicted, and the shot-marks found on the spot, that there must have been more than one discharge of firearms. There was some attempt made on behalf of the prisoners to account for these gun-shots by an accidental discharge in a struggle brought on by the Manjees, but there is no reason for accepting this explanation.

There can be no doubt that the guns were fired deliberately at the Manjees to injure some of them, and to ensure success to Debi Dass's party. Some of the witnesses even declare that certain persons, one of whom was the prisoner Kalimuddeen, were ordered to fire to drive off the Manjees; whichever party therefore made the first move, it is clear that the other was fully prepared to resist, and it is equally clear that the party of Debi Dass overcame the Manjees, and looted their houses after they ran away. There is no evidence to show that the prisoners acted in the exercise of their legal rights of self-defence, and therefore any one of them, who is proved to have been present engaged in this riot, is liable to be convicted of some offence connected therewith. The Sessions Judge has felt the difficulty of relying implicitly on the evidence of the Manjee witnesses who, no doubt, were actively engaged on their side, and he has adopted the extraordinary expedient of convicting the prisoners principally on what each has said regarding the other. However much the law (section 30, Evidence Act) may allow him to take into consideration a confession made by one of the prisoners as affecting himself and also another prisoner, the course which Mr. Gasper states the Sessions Judge adopted in recording the statements of the prisoners, and which is not denied by the Sessions Judge in reply to our inquiry on this subject, would prevent us

from giving full effect to that law. It would seem that, when the Sessions Judge was about to examine the prisoners, he required each to withdraw from the Court until his turn for examination came round. In consequence of this procedure, the principal prisoner, Chunder Sircar, was examined in the absence of the other prisoners, who never had an opportunity of denying or even knowing what he had said, and yet that statement made behind their backs is made the chief ground for convicting them. It is an elementary rule that no one should be condemned in his absence; and yet the Sessions Judge has acted in a manner directly opposed to it. We, therefore, are obliged to place entirely out of consideration any statement made by any of the accused in the absence of another prisoner, so far as it affects the latter.

It is quite clear, from the statements made by Chunder Sircar, Nundo Manjee, and Hukum Sheikh, that they were present when this riot took place. Hukum Sheikh, moreover, bears on his person marks of wounds received in it. It is, however, necessary to determine how far these prisoners were active members of the unlawful assembly causing this riot; and, as regards the two first, whether they have rightly been convicted of culpable homicide not amounting to murder. It has already been stated that the party of Debi Dass were guilty of a riot, and all the prisoners, now under trial belonged to that faction in the village of Tepri.

[The Court then dealt with the evidence, and in the end dismissed all the appeals.]

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Judgment.

## [CRIMINAL JURISDICTION.]

1881  
April 26th.

IN THE MATTER OF SAKHINA BIBI . . . . PETITIONER

No. 91 of  
1881.

*Penal Code (Act XLV. of 1860), section 211—False charge—Procedure—Enquiry by Police—Police report on charge made before Magistrate.*

A complaint having been made before a Magistrate, that officer, under section 146 of the Code of Criminal Procedure, directed an enquiry to be made by the Police, and, on such enquiry being held, it was reported to the Magistrate that the charge was false. Thereupon sanction to prosecute the complainant was granted under section 211 of the Penal Code.

*Held* that, inasmuch as the Magistrate, on receipt of the police-report, had not given the complainant an opportunity of substantiating the complaint, the Court had no power to sanction the prosecution. *Empress vs. Karimdad*, 1 L. R., 6 Cal. 496, (S. C.) 7 C. L. R. 467, and *Syud Nissar Hossen vs. Ram Golam Singh*, 25 W. R., Cr., 10, followed.

**A**PPEAL from a conviction and sentence passed by the Sessions Judge of Sylhet.

Baboo Joy Gobind Shome, for the Petitioner.

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In re  
SAKHINA  
BIBI.  
Judgment.

The facts are set forth in the judgment of the High Court (1), which was delivered by—

MORRIS, J.—It appears to us that there is no legal foundation for the trial of Sakhina Bibi under section 211 of the Indian Penal Code. Sakhina Bibi lodged a complaint, under sections 354 and 376, coupled with section 511, of the Penal Code, in the Court of the Extra Assistant Commissioner. After her examination, the Court, under section 146 of the Code of Criminal Procedure, directed a local enquiry to be made by a competent Police officer. This officer, a Sub-Inspector, submitted a report in which he expressed the opinion that the charge preferred was false, and that the complainant should be prosecuted for making a false complaint. Thereupon the Extra Assistant Commissioner passed the following order: "Let the papers be recorded as false, and let the papers be sent to the Deputy Commissioner for proper orders as regards instituting a case against the complainant under sections 211 and 182." Upon this the Deputy Commissioner, on the 3rd December, passed an order to the effect that, in his view, no notice ought to have been taken of the complaint owing to the character of the complainant, but, as an enquiry had taken place, he would allow the petitioner to be prosecuted if the District Superintendent of Police wished it. The District Superintendent of Police expressed a wish that a prosecution should follow. Upon this the Deputy Commissioner, on the 20th December, ordered the prosecution.

It seems clear to us that there has been no proper adjudication by the Extra Assistant Commissioner of the complaint preferred by Sakhina Bibi. On the receipt of the report of the Sub-Inspector he should have communicated its contents to the complainant, and afforded her an opportunity, if she so desired it, of producing the witnesses named in her complaint, or of giving such other proof in support of her complaint as she might think proper. Having thus put the complainant to the proof, and given her the oppor-



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In reSAKHINA  
BIBI.Judgment.MORRIS, J.

tunity of substantiating her complaint, the Extra Assistant Commissioner should have proceeded to decide the case. This course he has not adopted at all, and, as Sakhina Bibi was prepared to give evidence in support of her complaint, the Deputy Commissioner had, we think, no power to direct a prosecution under section 211 to be instituted. This is in accordance with the rulings of this Court in *Syud Nissar Hossen vs. Ram Golan Singh*, 25 W. R., Cr. R., 10, and in *Empress vs. Karimdad*, I. L. R., 6 Cal. 496: 7 C. L. R. 467. It also strikes us as improper that this prosecution should have been decided by the Deputy Commissioner contrary to his own expressed opinion as to its propriety, and solely in deference to the wishes of the District Superintendent of Police, whose subordinate had been complained against.

We have to observe, with reference to the Assistant Commissioner's explanation as to the examination of the complainant's witnesses, that their examination by the Sub-Inspector of Police when enquiring into the original complaint, and their subsequent examination in the present case as witnesses for the defence before himself, could not give the prisoner the opportunity of proving that the original complaint was true, to which she was entitled, before she could legally be prosecuted for making a false charge.

We therefore quash the proceedings which have resulted in the conviction of Sakhina Bibi under section 211, and, setting aside the sentence of 18 months' rigorous imprisonment, direct her release.

## [CRIMINAL JURISDICTION.]

JABDAR KAZI AND GOLAP KHAN . . . : . APPELLANTS.

1881  
Feb. 18th.

*Criminal Procedure Code (Act X. of 1872), section 454—Cumulative sentences—*  
*Penal Code (Act XLV. of 1860), sections 147 and 324—Separate charges.* Nos. 22 and 15 of 1881.

Under section 454 of the Code of Criminal Procedure, the collective punishment which may be awarded for offences under sections 147 and 324 of the Indian Penal Code must not exceed that which may be given for the graver offence.

*Quære.*—Whether separate convictions under sections 147 and 324 of the Indian Penal Code are legal?

IN the first of these appeals, both of which arose out of the same case, the prisoner was convicted under section 148 as well as under section 149 in connection with section 324 of the Indian Penal Code, and was sentenced, under the 1st charge, to 3 years' rigorous imprisonment, and, under the 2nd charge, to a further term of 2 years' rigorous imprisonment. Similar sentences had been passed in the same case in a previous trial on some other prisoners whose appeals were, however, dismissed by another Division Bench (JACKSON and TOTTENHAM, JJ.), the question now raised not having been argued before those learned Judges.

*L. Ghose* and Baboo Boido Nath Dutt, for the Appellants.

The Junior Government Pleader, for the Crown.

*L. Ghose.*—The second sentence of 2 years' imprisonment under sections 149 and 324 of the Indian Penal Code is illegal. When the offence falls under two separate definitions, the punishment must not exceed what might be awarded for either; and where several acts constituting different offences collectively amount to some other offence, the sentence must not be in excess of what might have been awarded for any one of the several offences, or for the offence formed by their combination—Criminal Procedure Code, section 454, paragraphs II. and III. The 1st paragraph of that section

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merely lays down a rule of pleading, and is silent as to the question of punishment. Illustration (f) to paragraph I., to which the Sessions Judge refers, merely makes it legal to pass separate sentences under each charge, or, in other words, to split the punishment which may be legally inflicted. But paragraphs II. and III. lay down the maximum which the collective punishment must not exceed. Here the maximum sentence under either charge being three years' imprisonment, the second sentence of two years' imprisonment is clearly illegal. Under the old Procedure Code, it was held that separate convictions and sentences under different charges arising out of the same transaction were not legal—*Reg. vs. Dina Sheikh*, 10 W. R., Cr., 63; *Nilrutton Sen*, 16 W. R., Cr., 45. But, under the new Code (section 454, paragraph I., III. (f)) separate convictions and sentences are not illegal, provided the maximum punishment, as laid down in paragraphs II. and III. of the same section, be not exceeded. [*Vide Empress vs. Budh Singh*, I. L. R., 2 All. 101, and *Noujan*, 7 Mad. H. C. R. 375; *Reg. vs. Gulam Abbas*, 12 Bom. 147.]

[MACLEAN, J.—There is also a Bombay Full Bench case—*Reg. vs. Tukaya Bin Tamana*, I. L. R., 1 Bom. 214.]

All these cases are under the new Code, and it is quite clear that, when the collective punishment exceeds the maximum provided in section 454 of the Criminal Procedure Code, paragraphs II. and III., it is illegal.

The Junior Government Pleader for the Crown.—The separate sentences are legal under Illustration (f), which declares that an accused person may be separately convicted and punished under each charge, and, as there are no words in the Illustration itself limiting the amount of punishment, there is nothing to prevent the maximum sentence being passed under each charge.

The appellant's Counsel was not called upon to reply.

The judgment of the High Court (1) was as follows:—

These appeals arise out of the same trial. The appellants have been convicted of being members of an unlawful assembly, in which one Guru Churn received fatal injuries, and one Babul Chand was less severely hurt.

It seems that they were acquitted of any offence as respects the death of Guru Churn; the conviction being for rioting armed with deadly weapons, under section 148, and for hurt caused to Babul

(1) MITTER and MACLEAN, JJ.

Chand, under section 324 read with section 149 of the Penal Code. The periods awarded being three years under section 148, and two years under sections 149 and 324.

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The learned Counsel, who appeared for Jabdar Kazi, appellant in Appeal No. 22, confined himself to urging that the sentences passed upon his client were in excess of what could be passed according to law, and that the injuries caused to Babul Chand by one of the members of the unlawful assembly—not found to be his client—were not caused in prosecution of the common object of the assembly.

The learned Counsel's contentions apply equally to the case of Golap Khan, for whom, however, he did not appear.

The first point turns upon section 454 of the Criminal Procedure Code, which provides for collective punishment, either for one offence falling within two separate definitions of law, or for acts severally constituting more than one offence, but collectively coming within one definition. In the former case one punishment, and in the latter separate punishments, may be awarded, but, in the former case, it must not exceed what can be awarded for either offence, and in the latter they must not collectively amount to more than could have been awarded for any one of the several offences, or for the combined offence. Illustration (f), which is referred to by the Judge, shows that offences under sections 147, 325, 152 may be separately dealt with.

In this case the conviction is for offences under sections 147 and 324, and this Court has held that separate convictions under those sections are not legal. [*Vide* the case of *Reg. vs. Dursoola*, 9 W. R., Cr., 33.] There is, however, a contrary ruling in the case of *Reg. vs. Calla Chand*, 7 W. R., Cr., 60, followed apparently by the case of *Empress vs. Ram Adhin*, I. L. R., 2 All. 139; but, whether there can be separate convictions or not, it is certain that, under section 454 of the Criminal Procedure Code, the collective punishment must not exceed that which may be given for the graver offence—*Reg. vs. Tukaya Bin Tamana*, I. L. R., 1 Bom. 214.

We shall, therefore, reduce the sentences on these appellants to three years in each case.

It is not necessary to discuss the second question raised in the appeal of Jabdar Kazi.

## [ CRIMINAL JURISDICTION. ]

1881  
Mar 30th.

IN THE MATTER OF IMANDI KHAN . . . . . PETITIONER.

No. C 204.

*Criminal Procedure Code (Act X. of 1872), section 521 —Procedure—  
Obstruction—Thoroughfare.*

The fact of a Magistrate taking action under section 521 of the Code of Criminal Procedure is *prima facie* sufficient to show that he considers the *locus in quo* to be a thoroughfare or public place; and if no objection is taken that it is not such, and the jury find that the order made under that section is reasonable and proper, the High Court will not interfere.

REFERENCE submitted by the Sessions Judge of Backergunge for the opinion of the High Court as to the legality of an order made

by the Deputy Magistrate under Chapter XXXIX. of the Code of Criminal Procedure.

The order in question was made under section 521 of the Code. No objection was made that the place to which it referred was not a thoroughfare or public place. The petitioner merely asked that the matter should be referred to a jury.

The Sessions Judge was of opinion that the proceedings were bad, and should be quashed for the following reasons stated by him:—

“The reason for their being quashed is, that the Deputy Magistrate has applied Chapter XXXIX. of the Criminal Procedure Code in a case where admittedly it has no application.

“It will be seen that one of the first questions laid down for the jury to decide is, whether the way in question is a public thoroughfare.

“Until that point is decided by other proceedings, Chapter XXXIX. cannot be enforced.”

The opinion of the High Court (1) was as follows:—

Section 521 of the Code of Criminal Procedure applies only to a thoroughfare or public place. The fact of the Magistrate taking action under section 521 is *prima facie* sufficient to show that he considered the *locus in quo* to be a thoroughfare or public place. No objection on this head was made by the petitioner, who merely asked for a jury. In the case of *In the Matter of Chundernath Sen*, I. L. R., 5 Cal. 875, the fact of the place being a thoroughfare was disputed, and was properly held that, if it was not a thoroughfare, the Magistrate had no jurisdiction, and that he ought, therefore, to have tried this point first; but the present case differs from that case in this very respect:

The finding of the jury that the place was a thoroughfare may be taken to be mere surplusage, as no question on this point was raised. The jury have found the Magistrate's order to be reasonable and proper; and we must decline to interfere.

(1) PONTIFEX and FIELD, JJ.

1881

—  
In re  
IMANDI  
KHAN.

—  
Judgment.

## [CRIMINAL JURISDICTION.]

1881  
May 20th.

—  
S  
—

No. 323 of  
1881.

IN THE MATTER OF MOHUR MANDAR . . . PETITIONER.

*Criminal Procedure Code (Act X. of 1872), sections 521 and 525—Evidence—  
Procedure.*

Where a person, to whom an order has been issued under section 521 of the Code of Criminal Procedure, appears to show cause against such order, the Magistrate is bound to take evidence under section 525 of the Code.

REFERENCE submitted by the Sessions Judge of Bhaugulpore on the 14th May 1881 for the opinion of the High Court. The circumstances were as follow :—

On the 23rd February 1881,, Jadunath Panday complained to the Magistrate of the District that Mohur Mandar had closed a road to the inconvenience of him and others. Some inquiries and orders followed ; and, on the 24th March 1881, the District

Magistrate passed the following order: "Under section 521, issue an order to Mohur Mandar to remove the obstruction, or to appear before the Joint Magistrate within three days of receipt of order to show cause why it should not be carried out." The Joint Magistrate did not deal with the case. Mohur Mandar appeared, and put in a petition of objection dated the 30th March, and the District Magistrate, on the 6th April, made an order that "the objection is not good. The road must be opened at once, and if this is not done within three days, the Police will open it out at the objector's expense. The cost, if not paid, can be recovered under section 525." It was represented to the District Judge that the order was illegal, because the present petitioner having appeared to show cause against the order under section 521, the Magistrate was bound, under section 525, to take evidence before he could make the order under section 521 absolute. The District Judge considered that, under the law, it was imperative on the Magistrate to take evidence when, in answer to an order under section 521, the person called upon appeared to show cause against the order. Under the circumstances, therefore, he referred the matter to the High Court.

1881  
 In re  
 MOHUR  
 MANDAR.  
 —  
 Statement.  
 —

The order of the High Court (1) upon the Reference was as follows :—

The order of the 6th April is clearly opposed to section 525, which directs the Magistrate to take evidence when the person, to whom an order under section 521 has been issued, appears to show cause against the same. In this case the person, Mohur Mandar, did show cause, but no evidence was taken.

The order of 6th April is set aside.

(1) MITTER and MACLEAN, JJ.



## [CRIMINAL JURISDICTION.]

1881  
April 21st.  
No. 188 of  
1881.

GOLAP DHANOOK . . . . . APPELLANT ;

AND

EMPRESS . . . . . RESPONDENT.

*Criminal Procedure Code (Act X. of 1877), section 237—Guilty, Plea of—Plea of guilty to be recorded.*

Where a prisoner, on the charge being read and explained to him, pleads guilty the Judge must record the plea under section 237 of the Criminal Procedure Code, and not merely record a narrative of what occurred, and of the statements made by the prisoner. An admission which does not admit all the elements of the charge is not a plea of guilty to the charge.

**A** PPEAL from a conviction and sentence passed by the Officiating Sessions Judge of Bhaugulpore.

The facts appear from the judgment of the High Court (1), which was as follows :—

The conviction is bad in law, and must be set aside. The Sessions Judge states that the prisoner pleads guilty to the charge; and that the only question is as to what punishment should be allotted. We find in the proceedings no record of the prisoner's plea, as required by section 237 of the Criminal Procedure Code when a prisoner pleads guilty. All that we find is a narrative by the Judge of what occurred, and of the statements made by the prisoner. We do not find from this that the charge was explained as well as read to the prisoner. *Vide* section 237. And we do find that he did not admit one very important element in an offence under section 211, Penal Code, *viz.*, the intention to injure another. The prisoner is said to have represented that he made the false complaint unthinkingly. This certainly does not amount to a plea of guilty.

The Judge was further somewhat inconsistent, for, after stating that the prisoner pleaded guilty, he proceeds to show that he was not guilty of the charge as framed, inasmuch as he had not made a complaint of an offence under section 304 of the Penal Code which was alleged in the charge.

The Judge committed an error, therefore, in convicting the prisoner without a trial. We, therefore, set aside the conviction and sentence, and direct that the prisoner be tried according to law, and that the Judge conform to the procedure laid down in Chapter XIX. of the Criminal Procedure Code.

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GOLAP  
DHANOOK  
v.  
EMPRESS.  
Judgment.  
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## [CRIMINAL JURISDICTION.]

1881  
May 29th.  
—  
No. 109 of  
1881.

DAMODUR BEDYADUR AND ANOTHER (PETITIONERS)

AND

SHYAMANUND DEY AND OTHERS.

*Criminal Procedure Code (Act X. of 1872), section 530—Preliminary proceeding before Magistrate—Dispute likely to give rise to breach of peace—Jurisdiction.*

It is not sufficient to give a Magistrate jurisdiction under section 530 of the Code of Criminal Procedure for him to record in his final judgment an opinion or proceeding that it is probable that a breach of the peace will occur if proceedings under that section be not taken.

**M**OTION to set aside an order passed under section 530 of Act X. of 1872 by the Deputy Magistrate of Balasore.

The petitioners in this case, who were mowrosee mukuddums of Mouzah Shahpore, of which Rajah Shyamanund Dey and others were the zemindars, alleged that the mouzah comprised 1,396 muns, of which 1,100 muns had been marked as waste lands at the time of the survey in 1840; that they or their predecessors in title had been in possession since 1267, and had, during that period, gradually brought the waste lands into cultivation.

In 1874 a suit was instituted by the petitioner against one Fakir Rout for rent in respect of portion of the land brought into cultivation, and, in that suit, the zemindars applied to intervene, claiming the land as in their khas possession; but their application was disallowed, and the petitioners obtained a decree.

The zemindars thereupon filed a suit claiming the land, the subject-matter of the suit brought by the petitioners. This suit was ultimately dismissed by the High Court on the 9th July 1878.

On the 15th October 1880, a petition was presented by one Bonomali Dass, who was described as a karpurdaz of the zemindars, praying that he might be retained in possession of certain Jalpai lands by an order under section 530 of Act X. of 1872.

Thereupon, without recording any proceeding, the Deputy Magistrate to whom the petition was presented made an order

"that both parties do file their written statements on the 20th November."

Evidence was afterwards gone into, and, on the 14th February 1881, the Deputy Magistrate passed an order declaring the zemindars to be entitled to hold the whole 1,100 muns claimed by the petitioners, in respect of portion of which they had obtained a decree, as already stated.

The petitioners now prayed that that order might be set aside for the following among other grounds:—

(1) That no proceeding had been recorded by the Deputy Magistrate, stating the grounds upon which he was satisfied that a dispute likely to induce a breach of the peace existed.

(2) That there was nothing to show that he was, before the institution of these proceedings, satisfied that there was a likelihood of a breach of the peace.

(3) That, inasmuch as the petitioners' tenants were in possession, no order ought to have been made under section 530 of the Criminal Procedure Code.

In his judgment, the Deputy Magistrate stated that he considered it was probable that a breach of the peace might have occurred if proceedings under section 530 were not taken.

*Branson and Baboo Umbica Churn Bose, for the Petitioners.*

*M. M. Ghose and Baboo Obhoy Churn Bose, Contra.*

The judgment of the High Court (1) was as follows:—

In a proceeding under section 530 of the Criminal Procedure Code between the petitioner and the opposite party regarding the possession of 1,100 muns Jalpai lands, the Deputy Magistrate of Balasore, on the 14th February last, confirmed the opposite party in possession. The record shows that no preliminary proceeding, stating the grounds upon which the Magistrate was satisfied that a dispute likely to induce a breach of the peace existed, was recorded. Probably on this ground, at the final hearing, objection was taken to the jurisdiction of the Magistrate, and he deals with this question in the final judgment. . .

One of the grounds upon which this rule was obtained was, that the Magistrate having omitted to record the preliminary

(1) MITTER and MACLEAN, JJ.

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 DEY.  
Judgment.

proceeding referred to above, the whole proceeding was *ultra vires*, and therefore should be set aside. It has been contended, on behalf of the opposite party, that, as the final judgment shows that the Magistrate was satisfied of a dispute likely to induce a breach of the peace existing, the mere omission to record a preliminary proceeding, as is required by the 2nd para. of section 530, is an immaterial irregularity, which would not warrant this Court, under section 283 of the Criminal Procedure Code, in quashing the proceedings of the lower Court. On the other hand, it was broadly contended that the omission to record this proceeding is, under *all circumstances*, a fatal error, which would justify this Court in setting aside the proceeding, the provisions of section 283 notwithstanding. The decision in the case of *Sheikh Munglo vs. Durga Narain Nag*, 25 W. R. 74, certainly supports this contention. But there is a decision reported in 22 W. R. 81, which rules the contrary.

Whether the one or the other contention is correct, it is clear to us, upon the authority of the cases cited below, that a Magistrate would have no jurisdiction under section 530 unless he was satisfied that there exists a dispute concerning land, which dispute is likely to induce a breach of the peace, *i. e.*, there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for the Magistrate to take immediate action under section 530 to prevent the apprehended breach of the peace. *See* 4 W. R., Cr., 26; 5 W. R., Cr., 14; 9 W. R., Cr., 64; 3 B. L. R., Cr., 76; 9 B. L. R. 229; 22 W. R. 81; 5 W. R. 4; 24 W. R. 17.

We have considered the finding of the Deputy Magistrate upon this point in his final judgment, and we are of opinion that it is not sufficient to give him jurisdiction under section 530. It seems to us that what he says is, that it is probable that a breach of the peace will occur if a proceeding under section 530 be not taken. This finding would not give him jurisdiction.

We therefore set aside his order, and make the rule absolute.

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## [CRIMINAL APPELLATE JURISDICTION.]

KHORSHED KAZI AND ANOTHER . . . . . APPELLANTS;

AND

EMPRESS . . . . . RESPONDENT.

1881  
May 30th.No. 276 of  
1881.

*Forged document—Penal Code (Act XLV. of 1860), section 471—Fury,  
Charge to—Misdirection.*

Where the accused were charged, under section 471 of the Penal Code, with having, in a suit brought against them by the vendee of their sister to recover possession of certain property acquired by her by right of inheritance from her father, fraudulently and dishonestly used a forged document as genuine, knowing or having reason to believe it to be a forged document, it appeared that the

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 v.  
 EMPRESS.  
 ———  
*Judgment.*  
 ———

accused were in possession of the property, and that the document in question purported to be a deed of gift from their father.

It was proved that the endorsement of registration which appeared in the document was a forgery.

In his charge to the Jury, the Sessions Judge omitted to deal with the fact of the accused being in possession of the property. He also directed that the registration-endorsement having been proved to be a forgery, it was for the accused persons to establish the genuineness of the document.

*Held* that it was not sufficient for the Jury merely to decide on the evidence whether the document was a forgery, and whether the accused knew it was a forgery when they used it, but it was further necessary for the Jury to decide whether the document had been used fraudulently and dishonestly.

*Held*, also, that the Sessions Judge, in omitting to deal with the fact of the possession of the accused, and in throwing the *onus* of proving the genuineness of the document upon them, had misdirected the Jury.

**A**PPEAL from a conviction and sentence passed by the Sessions Judge of Hooghly.

The appellants were the sons of the late Shufuruddeen Kazi, who also left him surviving a daughter Shurifunnéssa, and a widow, the mother of these children. In a suit brought by one Buduruddin against the appellants to recover possession of the share of the landed property which devolved upon his vendor, the daughter of aforesaid Shufuruddeen, by right of inheritance, the appellant Dhunu Kazi produced a hiba-bil-iwaz, alleged to have been executed by his father on the 17th Falgoun 1260, corresponding with the 27th February 1854. This document was produced to show that the father made a gift of all his landed property to the sons. The document purported to bear an endorsement of registration No. 32, dated the 12th April 1854, by Golam Rusool Kazi of pergunnah Jehanabad. The appellant Dhunu Kazi admitted the production of the document. He also alleged that he received it from his brother, the other

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 Judgment.

appellant, who also admitted having sent it to his brother to be produced in Court in support of their defence—that their sister had no share in the land in dispute. The document was alleged to be a forgery; and the appellant Dhūnu Kazi was charged under section 471, Indian Penal Code, with having fraudulently or dishonestly used it in a judicial proceeding as genuine, knowing or having reason to believe it to be a forged document. The other appellant, Khorshēd, was charged with having abetted that offence. The Sessions Judge of Hooghly, in accordance with an unanimous verdict of the Jury, found them guilty on these charges, and sentenced them each to 5 years' rigorous imprisonment and 100 rupees fine. From the conviction and sentences, the prisoners presented this appeal.

Baboo *Umbica Churn Bose* and Baboo *Troylukho Nath Mitter*, for the Appellants.

*Shurufuddeen* and Baboo *Saligram Singh*, for the Crown.

The following judgments were delivered by the High Court (1):—

MITTER, J. (after stating the facts).—As the objection urged in appeal is, that there are several material errors both of omission and commission in the charge of the Sessions Judge to the Jury, I shall briefly state the substance of it.

The Sessions Judge first of all tells the Jury that it must be proved in the first instance that the document in question is forged; that then the Jury will have to decide whether the accused person knew it to be forged, and, having this knowledge, fraudulently and dishonestly used it as genuine; that the accused persons admit they used it as genuine in the civil suit; that, therefore, the questions which the Jury will have to consider are (1) "Is the document a forgery or not;" and (2) "Did the accused know it was a forgery when they used it as above?"

Then the Judge gives a brief history of the case as proved in the evidence, in the course of which he alludes to the fact that the Moonsiff in the civil suit "held the hibba propounded to be a forgery, and directed the criminal prosecution which has ended in this trial."



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 Judgment.  
 MITTER, J.

The Judge further refers in detail to the evidence adduced by the prosecution to prove the registration-endorsement upon the document to be a forgery. After placing that evidence before the Jury, the Judge continues as follows: "If my own opinion is of any use to you, I have no hesitation in stating that it seems to me to show as clearly as can be shown by such means that the document *A* was not really attested or registered by any official Kazi of Jehanabad, and that thus, so far as the certificates of such attestation and registration go, these are forgeries."

Then further on, he says: "It does not of course necessarily follow that the document itself is a forgery, because these certificates on it are forged; but it does follow in the nature of things that the document too should be regarded with suspicion, and that the clearest evidence of its genuineness and authenticity should be required before it is accepted as genuine, &c. \* \* \* \* Primarily it would be for those who assert the genuineness of the document to prove this by the evidence of those attesting witnesses who are alive still, as it is in evidence that some are."

Then he discusses the evidence of three witnesses for the prosecution examined to prove that certain signatures purporting to be those of the three of the attesting witnesses to the document are really not their signatures. He concludes his observations upon the testimony of these witnesses with the remark that "little or nothing against the document can be gathered from such evidence."

Then the Judge, referring to the date of the death of the father of the accused, says that there is some discrepancy in the evidence bearing upon that point. He also points out that the accused have not adduced any evidence to prove the execution of the document or its existence at any time before this dispute arose. After referring to the two incompatible statements made by the accused Khorshed before himself and the committing officer respectively, *viz.*, that, before the latter, the accused said that he obtained the document in question from his father, while, before the Sessions Court, his statement was, that he got it from his mother the Judge concludes as follows:—

"On the evidence, you must decide whether or not you believe the document *A* to be a forgery. If you find it to be a forged

document, you must ask yourselves whether or not the accused must have known it to be a forged document. If you find they knew this, you should convict them, as they acknowledged the use of it."

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KHORSHED  
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v.  
EMPRESS.  
Judgment.  
MITTER, J.

I think that the objection taken before us against the Judge's charge is well founded. It seems to me that the Judge was in error in stating to the Jury that the second question which they had to decide was, "Did the accused know it was a forgery when they used it as above." This is not sufficient, because the prosecution in connection with this point must prove also that the use of the document was made by the accused "fraudulently" or "dishonestly" in the sense in which these two terms are used in the Penal Code. In order to prove this fact, the prosecution must show that the accused had no reasonable ground for asserting their title to the land in dispute. The Judge had not at all alluded to this question. The factum of possession and the date of the death of the father of the accused persons are material points for consideration with reference to this question. If the sister of the accused, after the death of the father, had not been in the possession of her share of the land in dispute for more than 12 years, the accused would have good ground for asserting their title to it. The Judge has wholly omitted to deal with this part of the case, and the omission, we think, has materially prejudiced the appellants.

The Judge is further wrong in telling the Jury that the registration-endorsement being proved to be a forgery, it was for the accused persons to establish the genuineness of the document. This is clearly wrong; it was for the prosecution to establish its forgery. The Judge says that some of the attesting witnesses are still alive. Under these circumstances, the Judge ought to have told the Jury that it was the duty of the prosecuting Counsel to call them as witnesses.

The prosecution must also establish that the accused persons used the document fraudulently or dishonestly, knowing or having reason to believe it to be forged. The Judge has not referred to the evidence bearing upon the question of knowledge or belief. We need hardly point out that the finding of the Mootsiff or the Judge in the civil suit cannot be used as evidence in this case.

On the whole, we are of opinion that the errors and omissions

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pointed out above have materially prejudiced the appellants. We therefore set aside their conviction, and direct a re-trial.

MACLEAN, J.—From the fact that the appellants were defendants in the civil suit, I presume that they were in possession of the land claimed by the purchaser from their sister, and this is materially in their favour; for, being in possession, the impugned document would not be required for any purpose until their title was challenged. If the Jury believed that either of them received it from their father, or even from their mother, it would be a fair question for them, the jury, to consider whether either parent could have had any motive for forging it.

The Judge was wrong to say that it does not necessarily follow that the document itself is a forgery because the registration-certificates are forgeries, if he means to say that the forgery of these certificates is not an offence. In law the offence of forgery is complete if a part of a document is dishonestly made, so that the making of that part is intended to show that the document was executed at a date when it was not really executed.

The Judge has also misdirected the Jury in telling them that the *onus* of proving the due execution of the document lay on the appellants, and in pointing out that it was for the appellants, and not for the prosecution, to call the surviving witnesses to the execution.

I concur in setting aside the conviction, and ordering a new trial.

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## [CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF REASAT ALI . . . . . APPELLANT.

1881  
June 3rd.  
—  
No. 61 of  
1881

*Penal Code (Act XLV. of 1860), sections 463 and 464—Forgery—Attempt to commit forgery—Preparation for commission of offence—False document—Attempt to commit an offence.*

That which constitutes a false document within the meaning of sections 463 and 464 of the Indian Penal Code is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some other person to the document with a knowledge that the seal or signature is not his, and that he gave no authority to affix it.

A person, therefore, who has given orders for the printing of certain receipt forms similar to those formerly used by a certain Company, and corrected the proofs of the same, it being his intention to use the receipt forms in order to commit a fraud, cannot be convicted of forgery until one of the printed forms has been converted by him into a false document, nor of an attempt to commit forgery until he had done some act towards making one of the forms a false document. Until a form had been converted into a false document, all that was done consisted in mere preparation for the commission of an offence.

An attempt to commit an offence must be to do that which, if successful, would amount to the offence charged.

*Per GARTH, C. J.*—The fact, that the word "make" is used in section 464 of the Penal Code in conjunction with the words "sign," "seal," or "execute," clearly denotes that the making of a document does not mean writing or printing it, but signing or otherwise executing it.

**A**PPEAL from a conviction and sentence passed by the Sessions Judge of Burdwan.

The appellant was convicted of an attempt to commit forgery under circumstances which will be found stated at length in the judgments of the High Court.

[CRIMINAL.]

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Moonshee *Serajul Islam*, for the Appellant.

REASAT ALI.

In re

Judgment.

GARTH, C. J.

The following judgments were delivered by the High Court (1):—

GARTH, C. J.—The prisoner in this case was charged with an attempt to commit forgery, and the facts proved were, that he gave orders to the Burdwan Press to print 100 receipt forms similar to those which were formerly used by the Bengal Coal Company; that he corrected one proof of those forms, and was suggesting further corrections in a second proof, in order to assimilate the form to that now used by the Company, when he was arrested by the Police.

The Jury found him guilty of an attempt to commit forgery, "in that he dishonestly, and with the intent to commit fraud, caused a document to be printed with the intention of making such an addition to it as would make it a false document."

Assuming this finding of the Jury, as to what the prisoner actually did, to be correct, the question is, whether he could be legally convicted of an attempt to commit forgery?

The definition of forgery in sections 463 and 464 of the Indian Penal Code, so far as it is necessary to refer to it for our present purpose, is as follows: Section 463 says, "Whoever makes a false document or part of a document with intent to commit fraud commits forgery."

And, by section 464, a person is said "to make a false document who dishonestly makes or executes a document or part of a document, with the intention of causing it to be believed that such document was made, sealed, or signed by, or by the authority of, a person by whom, or by whose authority, he knows that it was not made, sealed, or signed."

Now, in this case, the Jury have not found that the receipt form itself was a false document. If they had, they must have found the prisoner guilty of forgery, and not of the attempt to commit it.

They considered, and rightly considered, as it seems to me, that, without the addition of a seal or signature purporting to be the seal or signature of the Bengal Coal Company, the printed

form would not be a false document. Their view, as I understand it, was, that the commencing to print or write a document, which, when completed, was intended to be a false document, amounted, if coupled with the intent to defraud, to an attempt to commit forgery. But it has been suggested that the printing and correcting of a form, which is intended by additions, which are to be made to it, to be a false document, is in itself the making of a part of a false document within the meaning of section 464, and therefore amounts to forgery.

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If this were so, it seems to me that the mere printing or writing of a single word upon a piece of paper, however innocent the word might be, would be the making a part of a false document if it were coupled with an intention to add such other words to it as would make it eventually a false document.

In my opinion, this is very far from the meaning of section 464; and I think that such a construction of the section involves a misconception, not only of the word "make," but also of the sense in which the phrase "part of a document" is used in the section. •

I consider that the making of a document does not mean "writing" or "printing" it; but signing or otherwise executing it—as in legal phrase we speak of "making an Indenture" or "making a Promissory note," by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. • The fact that the word "makes" is used in the section in conjunction with the words "signs," "seals," or "executes," or "makes any mark denoting the execution," &c., seems to me very clearly to denote that this is its true meaning. What constitutes a false document or part of a document is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document or part of a document being signed or sealed with the name or seal of a person who did not in fact sign or seal it.

Referring, then, again to the finding of the Jury, the question in this case seems to be, whether what the prisoner did amounted to preparation only, or to an actual attempt, to commit the offence.

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In the case of *Queen vs. Cheeseman*, Leigh and Cave's R. 145, Lord BLACKBURN thus defines an attempt to commit a crime. He says: "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but, if the actual transaction has commenced, which would have ended in the crime, if not interrupted, there is clearly an attempt to commit the crime;" and in *Reg. vs. McPherson*, Dearsley and Bell, Crown Cases, \*202, COCKBURN, C.J., says: "The word attempt clearly conveys with it the idea, that, if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged."

It seems to me that this definition of an attempt to commit an offence is a sound one; and, applying it to the present case, the question is, whether what the prisoner did amounted to an attempt to make a false document.

I have already said that, in my opinion, the printed form was not in itself a false document, and that it would not have become a false document or part of a document, according to the definition in section 464, until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company.

The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and, for the same reason, I think that he would not be guilty of attempt to commit forgery until he had done some act towards making one of the forms a false document.

If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and only had completed a single letter of the name, I think that he would have been guilty of the offence charged, because (to use the language of Lord BLACKBURN) "the actual transaction would have commenced, which would have ended in the crime of forgery if not interrupted."

But, as it was, all that he did consisted in mere preparation for the commission of the crime.

He was no more guilty of an attempt to commit forgery in having the form printed than he would have been of an attempt to

commit burglary by having a false key made of the house where he intended to commit the offence.

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REASAT ALL.

*Judgment.*

I think, therefore, that the conviction should be set aside, and the prisoner discharged. He may think himself extremely fortunate that his premature arrest prevented him from completing what he evidently intended.

PRINSEP, J.—I concur in setting aside the verdict of the Jury and the sentence passed on the appellant, because, in my opinion, the acts found by the Jury to have been committed do not amount to an attempt, but, at most, only to a preparation to commit a forgery, which might have proceeded no further. I agree in the opinion expressed by the Chief Justice regarding the legal definition of an attempt to commit an offence, *viz.*, that there must be something “commenced which would have ended in the crime if not interrupted.”

PRINSEP, J.

The prisoner must therefore be acquitted and released.



## [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF HURSEE MOHAPATTER . . . PETITIONER;  
AND  
DINO BUNDHOO PATTI.

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July 13th.  
—  
No. 27 of  
1880.

*Tributary Mehals, Criminal Jurisdiction of Superintendent of—Superintendent of Tributary Mehals, Powers of—Scheduled Districts Act (XIV. of 1874), Schedule I.—Act XV. of 1874, Schedule VI. and section 3—Government, Authority of orders of, as to the Criminal Jurisdiction of the officers of the Tributary Mehals.*

A complaint having been preferred to the Rajah of Mohurbhunj, one of the Tributary Mehals, charging the petitioner and others with libel, the Rajah issued processes through the Magistrate of Midnapore for the attendance of the accused, who were residents of that district. The accused then applied to the Magistrate that the charge should not be tried by the Rajah, and, upon reference to the Superintendent of the Tributary Mehals, the case was transferred to the Magistrate of Midnapore, an officer invested with certain powers as Assistant to the Superintendent of the Tributary Mehals.

Two of the accused were summoned before the Magistrate, and a charge was drawn on the 13th December 1880 under section 500 of the India Penal Code, purporting to be drawn up by the Magistrate as Assistant Superintendent of the Tributary Mehals.

On the 18th January, the complaint was withdrawn regarding one of the accused, and the case proceeded against the other, who now moved the High Court to set aside the proceedings as having been made without jurisdiction.

It appeared that, on the 12th December 1870, the Secretary of the Bengal Government informed the Magistrate of Midnapore that, as *ex-officio* Assistant Superintendent of the Tributary Mehals, he was empowered to try all offences

committed within the Tributary Mehals not punishable with death, and to pass sentence not exceeding seven years, submitting his proceedings in each case to the Superintendent. On the 8th August 1872, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a Sessions Judge, with power to hear appeals from sentences passed by Subordinate Officers in Tributary Mehal cases.

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Statement.

Mohurbhunj was not specified among the scheduled districts of Bengal in Schedule I. of Act XIV. of 1874 or Schedule VI. of Act XV. of 1874.

*Held* that Mohurbhunj was a part of British India.

*Per PRINSEP, J.*—That, although part of British India, and, as such, and by reason of its not being a scheduled district, it would ordinarily be subject to the general law, Mohurbhunj is specially exempted therefrom by Regulations XII., XIII., XIV., of 1805, and, except under special regulation, could not be made subject to any general law.

*Per CUNNINGHAM, J.*—That, though Mohurbhunj is not one of the scheduled districts, the preamble to Act XIV. of 1874 shows that those districts were not the whole, but merely among the parts, of India, which had either never been brought within, or had been removed from, the ordinary jurisdiction of the Courts; that, consequently, with the saving clause, section 10, Act XI. of 1874, it would not be subject to the ordinary law, Regulations XIII. and XIV. of 1805 being still in force.

*Per curiam.*—That the Magistrate of Midnapore was not competent in Midnapore to hold a trial of an offence committed in Mohurbhunj.

*Per PRINSEP, J.*—That the Local Government was not competent to invest the Magistrate of Midnapore or the Commissioner of Cuttack with criminal powers in Mohurbhunj.

Regulations and Acts relating to the Tributary Mehals discussed.

**R**ULE to show cause why certain proceedings had before the Magistrate of Midnapore should not be set aside.

The facts, as set out in the petition of Hursee Mohapatter, are as follow :—

A complaint was preferred to the Rajah of Mohurbhunj charging the petitioner and two others with defamation. Thereupon the Rajah issued processes through the Magistrate of Midnapore for the attendance of the accused,

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who were residents of that district. The accused petitioned Mr. Price, the Magistrate of Midnapore, that the case should not be tried by the Rajah. The Magistrate forwarded the petition to the Superintendent of the Tributary Mehals, who addressed the Rajah, requesting him to make over the papers of the case to the Magistrate of Midnapore, "who," it was observed, "has the powers of an Assistant to the Superintendent of the "Tributary Mehals." This officer, under his usual official seal, summoned two of the accused: they appeared before him; several witnesses were examined; and, on 13th December 1880, he framed a charge against them under section 500 of the Indian Penal Code. This charge was entitled as made by the Assistant Superintendent of the Tributary Mehals.

On the 18th January 1880, the prosecution was abandoned against one of the accused, and Mr. Price directed his acquittal.

The remaining accused then examined his witnesses, and the case was argued. Judgment had not been delivered, and the accused now moved the High Court to set, aside the proceedings as having been without jurisdiction.

*Paul, A. C. Phillips*, showed cause.

*M. Ghose* and *Baboo Boidonath Dutt*, in support of the Rule.

The following judgments were delivered by the High Court (1):—

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HAM, J.

CUNNINGHAM, J.—This case comes before us in the exercise of our powers of criminal revision.

The question before us is, whether the proceedings before Mr. Price, either as Magistrate or Assistant Superintendent of the Tributary Mehals, have been without jurisdiction, and whether, supposing them to be without jurisdiction, he is, in his capacity of Assistant Superintendent of the Tributary Mehals, amenable to the High Court.

The estate of the Rajah of Killa Mohurbhunj forms a portion of territory which was ceded by the Mahrattas to

the British Government in 1803: it forms one of a group of estates known as "the Tributary Mehals."

The history of these mehals, as shown by the Regulations, Acts, and Orders of Government, and so far as concerns the present inquiry, is as follows:—

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Regulation IV. of 1804, after reciting that the Province of Cuttack, including Balasore and other dependencies of the said province, had been ceded to the East India Company in full sovereignty, and that it was necessary to provide for the administration of criminal justice, formed the province into a "zillah" with two divisions, and a Magistrate in each, extended the Criminal Regulations of Bengal, but provided that the Court should not have power to take cognizance of cases committed before the 14th October 1803, the date on which the fort and town of Cuttack surrendered to the British arms.

Regulation XII. of 1805 provides for the collection of public revenue in zillah Cuttack. It recites and, with certain modifications, confirms a proclamation issued by the Commissioners, 15th September 1804, regarding the rights of landowners in the "Mogulbundee" tract of the zillah, *viz.*, that part in which the land itself was responsible for the revenue, and after generally extending the Regulations as to the settlement and collection of public revenue, it provides against the implication that any of those Regulations are for the present to be considered to be in force in certain enumerated jungle or hill zemindaries, occupied by a rude and uncivilized race of people, with the proprietors of which engagements were formed by the late Board of Commissioners for the payment of a certain fixed Government rent as tribute to Government. The same exemption was extended to Mohurbhunj, with the provision that the Collector should conclude a settlement with the proprietors of that estate for the payment of a fixed annual Government rent on the same principle as that observed in the case of the other hill or jungle zemindars.

Regulation XIII. of the same year deals with the maintenance of order and administration of justice in Cuttack, and (after excluding certain tracts) forms the rest of the district into one zillah instead of two, as provided by Regulation IV. of

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1804. Section 13 extends the Bengal Regulation as to criminal justice to the zillah, but excludes from its operation certain hill zemindaries and the territory of Mohurbhunj.

Regulation XIV. of the same year, in providing for the administration of civil justice, makes a similar extension of the Bengal Regulation, and contains a similar exemption to that contained in Regulation XII.

By Regulation X. of 1816, provision was made for trying inheritance-suits "in certain tributary estates" excepted by Regulation XIV., 1805, section 11, from the ordinary law. These suits were to be heard by the Superintendent of the Tributary Mehals, an officer who appears to have been appointed in 1814 (Hunter's Statistical Account of Bengal and Orissa, Vol. XIX., p. 196), but of whose appointment no official notification has been brought to our notice. The sub-division of estates was forbidden, and no suit could be taken up, the cause of action in which arose previous to "14th October 1803, the day on which the fort and town of Cuttack surrendered to the British arms."

An appeal from the Superintendent lay to the Sudder Adawlut, and in some cases to the King in Council.

The relations of the Rajah of Mohurbhunj to Government are defined by a Treaty Engagement executed by the Rajah on the 1st June 1829. By this the Rajah engaged with the East India Company always to maintain himself in submission and loyalty, to pay annually as peshkush for the zillah 1,001 rupees, to apprehend fugitives from Orissa, to apprehend and give up for trial, on demand any ryot who had committed "offence" within the Mogulbundee Territories, to supply provisions to the Company's troops when "passing through my territories," to offer no impediment to subjects of the Company passing through "my boundaries," to depute a contingent force of "my own troops," and to act with the forces of Government against recusant Rajahs, receiving only rations.

Act XXI. of 1845 enabled the Governor-General in Council to remove any of the estates mentioned in section 20, Regulation XI. of 1816 (including Mohurbhunj), and to place them under the jurisdiction of an officer to be appointed by the Government

of Bengal, and to be called Agent for the Suppression of Meriah Sacrifices, and his subordinates.

The agents so appointed were to be guided by instructions from time to time received from the Government of India through the Local Government, and the Government was empowered to prescribe rules for their guidance, and to prescribe the finality of their decisions in civil cases and the class of criminal cases which they were to submit to the Sudder Court.

Act XX. of 1850, after reciting that certain zemindaries and Mohurbhunj were temporarily exempted, by Regulations XII. and XIII. of 1805, from the ordinary revenue and criminal law, and that it was desirable to provide for disputes as to the boundaries of zemindars, provided that any boundary-dispute between the excepted estates and estates subject to the Bengal Regulations should be tried by the Superintendent of the Tributary Mehals, subject to confirmation by the Government of Bengal. On 24th September 1851, the Lieutenant-Governor of Bengal appointed Mr. Schalch, the Magistrate of Midnapore, to be an *ex-officio* Assistant to the Superintendent of the Tributary Mehals. In conformity with orders of the Secretary of State, 26th July 1860, adoption sunnuds were granted to the Rajahs of these mehals, which are therein described as "States," when subsequently the word "estates" was directed by the Lieutenant-Governor to be substituted. In speaking of them, the Government of India directed that the designation of "State," as employed by Lord Canning, should remain unaltered.

On the 12th December 1870, the Secretary of the Bengal Government addressed the Magistrate as *ex-officio* Assistant Superintendent, Tributary Mehals, informing him that, as *ex-officio* Assistant Superintendent of the Tributary Mehals, he was empowered to take up for trial all offences committed within the Tributary Mehals, not punishable with death, and to pass sentences not exceeding 7 years, submitting his proceeding in each case to the Superintendent. Trials thus conducted were to be, as far as possible, in accordance with the Criminal Procedure Code.

In 1872, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a

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Sessions Judge in Regulation Districts, and with power to hear appeals from sentences passed by any subordinate officers in Tributary Mehal cases.

On the 30th April 1873, the Government of Bengal addressed the Superintendent of the Tributary Mehals in answer to a letter submitting a tabular statement of the powers then exercised by officers in the tributary estate of Orissa, and the powers which, in the opinion of the Superintendent, ought to be exercised in accordance with the spirit of the new Criminal Procedure Code, and authorized the Superintendent to exercise the powers of Magistrate of a district, of a Sessions Judge under section 15 of the Act, and power to hear appeals from sentences under section 36. The Magistrates and ex-officio Assistant Superintendents of Tributary States were invested with powers of a Magistrate of the 1st class and under sections 36 and 322 of the Code.

Up to this point the effect of the acts of the Government, political, executive, and legislative, appear to have been, 1st, that the Tributary Mehals had become an integral portion of British India within the scope of the general powers of the Government, and subject to any legislative enactment duly passed in their behalf; and, 2ndly, that they had been expressly exempted from the ordinary law of the country, and were administered by specially appointed officers, under special enactments. As to these orders, it is important to remember that, by virtue of section 25 of the Indian Councils Act, 1861 (24 and 25 Vic, c. 67), no question can arise as to the validity of any rule, law, or regulation made by the Governor-General, or the Lieutenant-Governor for Non-Regulation provinces, prior to 1st August 1861, on the ground of its having been made otherwise than in accordance with existing law.

We have now to consider whether the position of Mohurbhunj was affected by the Laws Local Extent Act and Scheduled Districts Act passed in 1874.

It has been urged that, inasmuch as Mohurbhunj is not specified among scheduled districts of Bengal in Schedule I. of Act XIV. of 1874 or Schedule VI. of Act XV. of 1874, it is, under section 3 of the latter Act, subject to the ordinary law in force throughout British India.

This contention, however, proceeds, in my opinion, on a misconception of the import and effect of those measures\*

It is obvious from the preamble to Act XIV. of 1874 that the scheduled districts specified in the schedules of that Act and Act XV. were not the whole, but merely among the parts, of India which had either never been brought within, or had been removed from, the ordinary jurisdiction of the Courts.

It is indeed clear from the preamble and general language of the Act that the object was to declare, and, in some instances, consolidate, the existing law, and to clear away uncertainties as to jurisdiction, where they existed, not to alter the political position of any district, not expressly mentioned in them, and it was, no doubt, with this intention that section 5 (k) of Act XV. provided that nothing in the Act should affect the operation of any enactment not mentioned in any of the schedules.

Now Regulations XIII. and XIV. of 1805 and Regulation XI. of 1816, Act XXI of 1845, and Act XX. of 1850 were in force at the time of the passing of the Laws Local Extent Act. They are not mentioned in the Schedule to Act XV. of 1874, and they are therefore unaffected by its provisions.

The position of the Tributary Mehals was, accordingly, in my opinion, unaffected by the two measures in question. The subsequent repeal of some of the Regulations and Acts just mentioned would not, owing to the saving clause inserted in repealing Acts (*e. g.*, section 10 of Act XI. of 1874), affect any established jurisdiction or form of practice or procedure or existing usage, officer, or appointment, and we must hold accordingly that the Tributary Mehals are now, as they were in 1874, a portion of British India which the Government has been pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. If this be so, and if those special enactments have the effect of removing this part of the country from the ordinary criminal supervision of the High Court, it would be questionable whether the High Court had jurisdiction to interfere with the proceedings of the officials appointed by Government to administer the criminal law in the parts of the country so specially circumstanced.

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—

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As to the laws now actually in force in Mohurbhunj, it is impossible to deny that the effect of section 3 of Act XV. of 1874 has been to produce some obscurity as to the position of those parts of India, which, not being scheduled districts as enumerated in the schedules to the Acts, are yet not administered in complete accordance with the laws declared to be in force throughout the whole of British India except the scheduled districts, and that the difficulty thus occasioned is enhanced by the provisions commonly inserted in subsequent Acts—that the measure “shall extend to the whole of British India except the scheduled districts, as defined in Act XIV. of 1874.” It might be urged with great cogency that the intention of the Legislature, as gathered from these Acts, and especially from the last para. of section 1 of Act XIV. of 1874, was, that every part of British India, not subject to the ordinary law, should be administered in accordance with those Acts or with a scheme framed under the provisions of 33 Vic., ch. 3.

It is, however, unnecessary for the purpose of the present decision to come to a precise conclusion as to the legal position of Mohurbhunj, the validity of the various orders of Government concerning it, or the competence of the officers appointed to carry out those orders. The act with which we are concerned was not done in Mohurbhunj by an officer empowered to exercise jurisdiction there, but, in Midnapore, by a Magistrate empowered to act under the Criminal Procedure Code in an ordinary district, and trying a resident of that district. Now, whatever may be the powers of the Government as to Mohurbhunj, there is, in my opinion, no ground for the contention that those powers extend to empowering the legally-constituted tribunals of a British district to follow in that district, and in the case of residents in it, any procedure, and exercise any jurisdiction, other than that created by the law. When, therefore, the Superintendent of the Tributary Mehals proceeded to exercise a power not conferred on him by the order of 1872, in transferring a case from one district to another, and, when the Magistrate of Midnapore, dealing in Midnapore with a resident in the district, proceeded to exercise magisterial powers under another style, and to depart

in some material particulars from the provisions of the Code as to procedure, these officers seem to me to have been acting without jurisdiction, and their proceedings ought accordingly, in my opinion, to be set aside.

PRINSEP, J.—One Dinobundhoo Patti charged Hursee Mohapatter before the Rajah of Mohurbhunj with defamation. The accused apparently is a ryot of the Rajah holding lands and residing in Midnapore, and process was issued by the Rajah, through the Magistrate of Midnapore, for his attendance at Mohurbhunj. He petitioned the Magistrate of Midnapore not to execute this process on the ground, not that the Rajah had no jurisdiction to try him, but that, as the Rajah was personally concerned, a fair trial would not be held. The Magistrate of Midnapore, who also holds the undefined office of Assistant Superintendent of Tributary Mehals, on 30th June 1880, addressed the Commissioner of Cuttack as Superintendent, and apparently in that capacity his official superior, recommending that the case be transferred for trial either to Midnapore or Balasore.

On the 10th July, the Superintendent of Tributary Mehals directed the case to be tried by the Magistrate of Midnapore, and requested the Rajah to transmit the records to that officer. The trial then took place before the Magistrate of Midnapore, who, in the course of the proceedings, also signs himself as Assistant Superintendent.

The petitioner, having thus succeeded in procuring the transfer of the case to Midnapore, has obtained a rule from this Court on the ground that the proceedings of the Magistrate of Midnapore are without jurisdiction. I regret that, from the nature of this objection, we have been compelled to have the matter fully argued, for ordinarily such conduct would be deserving of no consideration.

This case has raised points of difficulty regarding the relations of the British Government towards the Territory of Mohurbhunj, the jurisdiction of the neighbouring Magistrates and of the Commissioner of Cuttack, or, as they are called, Assistant Superintendents and Superintendent of the Tributary Mehals, and, finally, whether we have any power to interfere, either as a Court of Revision under the Code of Criminal

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Procedure, or under the powers conferred on us under the Charter of the High Court.

As regards this last point, it is argued that the Magistrate of Midnapore and the Superintendent of Tributary Mehals having been vested with certain powers by the Government of Bengal, and, in the exercise of those powers, being in no way subordinate to the jurisdiction of this High Court, we can have no control over their proceedings, and, at any rate, we can have no control until they shall have terminated in such a manner as to enable us to exercise our authority as in a writ of *Habeas Corpus*. It is sufficient, however, for the purposes of the present case that I should state that, in the view that I take of the relations between the Government and Mohurbhunj, it is unnecessary for me, to consider the full extent of this argument. I should, however, be very disinclined to refuse to act on a *prima-facie* good objection to proceedings taken by a Judicial Officer in British territory, acting under authority of a very doubtful character, until the person against whom such proceedings were directed had suffered in some way from the consequences of such doubtful jurisdiction. It is our duty to prevent, rather than to endeavour to cure, the effect of injuries. If the argument be pressed to its extreme, it would be necessary for a man to be imprisoned or to have been whipped, or even to be under sentence of death, before we could intervene—a position that it would be impossible to accept.

The point which we are really called upon to decide is, whether the territory of Mohurbhunj is a Foreign State or British India. I would, however, first of all, remark that, even supposing for purposes of argument that Mohurbhunj is a Foreign State, the Magistrate of Midnapore would have no jurisdiction to try the petitioner, because, the offence charged (defamation) being an offence under Chapter XXI. of the Indian Penal Code, and no complaint having been made to him, he has, under section 142 of the Code of Criminal Procedure, no authority to take cognizance of it. Further, it may be remarked that the Magistrate would not be competent to deliver him to the Rajah or Mohurbhunj for trial, inasmuch as the Magistrate is not a Political Officer, as defined in section 3 of the Extradition Act (XXI. of 1879, appointed by any one of the authorities mentioned

in clause 2 ; nor, as far as we are informed, is there any officer who could so act supposing Mohurbhunj to be foreign territory.

I will now proceed to consider whether the tract of country known as Mohurbhunj is British India as defined by law ; and, to determine this, it is necessary to consider the manner in which this territory has been dealt with by the Legislature since its conquest by the British in 1803. .

From the terms of the treaty entered into between the Honourable East India Company and Senab Saheb Roghajee Bhoosla on 17th December 1803, it appears that the Province of Cuttack, including the port and district of Balasore, was ceded in perpetual sovereignty to the former, and article 10 refers to certain treaties made antecedently by the British Government with feudatories of the Senab Saheb Soobah, which were then confirmed (*see* Aitchison's Treaties, Vol. III., pp. 97, 98). These treaties were made with several of the Chiefs of the Cuttack Tributary Mehals as they are now called, and are reproduced in Aitchison's Treaties, Vol. I., pp. 180, *et seq.* The Chief of Mohurbhunj was not among those Chiefs ; but that is not material, for it is clear that Mohurbhunj, as well as other Tributary Mehals, was ceded as portion of the Province of Cuttack. The terms of Regulation IV. of 1804, and of Regulations XII., XIII., and XIV. of 1805, show that, within the term "dependencies of the Province of Cuttack," was included the territory of Mohurbhunj.

Regulation IV. of 1804, section 7, gives the 14th of October 1803 as the date of this conquest and the commencement of the jurisdiction of the Courts established under that law for the administration of justice in criminal cases and the authority of the Police. And it was declared that the general Regulations in force in the Provinces of Bengal and Behar should be in force unless it should be otherwise specially directed in any such Regulation.

In the following year, 1805, three Regulations were passed relating to the zillah of Cuttack, namely, Regulation XII. for the settlement and collection of the public revenue, and Regulation XIII. for the maintenance of peace and the support and administration of the Police, and Regulation XIV. for the administration of justice in civil cases ; but the territory of Mohurbhunj, together with the estates of other hill or jungle

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Rajahs or zemindars, now denominated the "Tributary Mehals," was expressly excluded from the operation of these Regulations, the concluding portion of each of the Regulations containing a provision to that effect. The power of legislating for the territory of Mohurbhunj was, therefore, clearly asserted by the Regulations of 1805, but it was declared that, for the present, the exercise of such power would be reserved.

The preamble of Regulation XI. of 1816 is to the following effect: "Whereas it is necessary that provision should be made for receiving, trying, and deciding claims to the right of inheritance or succession in certain tributary estates in zillah Cuttack, which were excepted by section 11, Regulation XIV. of 1805, from the operation of the general rules for the administration of civil justice established in the Provinces of Bengal, Behar, and Orissa, and whereas the nature of the tenures by which those estates are held, the character of the inhabitants, and other local circumstances render it expedient that the estates in question should not be subject to partition, but should descend entire and undivided to the persons respectively having the most substantial claim according to local and family usage, the following rules have been enacted to be in force from the date of the promulgation of this Regulation in zillah Cuttack." That law provided for a regular procedure, with a right of appeal, first to the Sudder Dewanny Adawlut, and ultimately to the King in Council in the matters above described. This is the first occasion in which I can find mention made of the office of Superintendent of Tributary Mehals.

The next legislative enactment in which reference is made to the Tributary Mehals is Act XXI. of 1845. That was an Act passed for the suppression of Meriah sacrifices in the Hill tracts of Orissa. Section 1 made it "lawful for the Governor-General in Council, by an order in Council, to remove from the jurisdiction and superintendence of the Commissioner and Superintendent of the Tributary Mehals in Cuttack, and of the Tributary Estates specified in section 2, Regulation II. of 1816 of the Bengal Code, and to place any such estates under the jurisdiction and superintendence of such officer (to be called

"the agent for the suppression of Meriah sacrifices) and his "subordinates, as shall, from time to time, be appointed by the "Government of Bengal on that behalf." It is important, too, to note the terms of section 6 under which it shall be competent for the Governor-General in Council to prescribe such rules as he may deem proper for the guidance of such agents and subordinates, and to determine to what extent the decision of the said agents in civil suits shall be final, and in what suits an appeal shall lie to the Sudder Court, and to define the authority to be exercised by the said agents in criminal trials, and what criminal cases they shall submit for the decision of the Sudder Court.

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Thus it appears from the terms of Act XXI. of 1845 that the Commissioner of Cuttack, as Superintendent of Tributary Mehals, had some power over that territory, the exact extent of which power has not been made known to us, but that power, whatever it was, was not conferred by any legislative enactment; but that the Legislature, in empowering the Governor-General in Council to remove that territory from his jurisdiction, thought it necessary specially to empower the Governor-General in Council to pass executive orders having the force of law, regulating and determining how far the orders of the agents should be final, in what suits an appeal should lie, what should be their power in criminal trials, and what cases they should submit for decision of the Sudder Court.

The preamble of Act XX. of 1850 is in somewhat the same terms as that of Regulation XI. of 1816 in declaring that the territory of Mohurbhunj and certain jungle and hill zemindaries in the zillah of Cuttack were temporarily exempted from the laws in force in other parts of India subject to the Government of Bengal. But it was found necessary to give jurisdiction to some officer of Government to determine disputes regarding the boundaries of those zemindaries. Accordingly the Superintendent of Tributary Mehals was appointed for this purpose. These are all legislative enactments specially relating to Mohurbhunj and other tributary Mehals up to 1874. Act XIV. of that year declared that that Act extends, in the first instance, to the whole of British India within the territories mentioned in the First Schedule thereto annexed; and among

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these Schedules are to be found only two from among the Tributary Mehals. These two Mehals, as they are termed, are the Mehals of Angool and Bunki which had been taken under the direct management of Government some years previously in consequence of misbehaviour of their hill Rajahs or zemindars.

Act XV. of the same year, which was passed simultaneously with Act XIV., declared that all the Acts mentioned in the First Schedule thereto annexed are now in force throughout the whole of British India except the scheduled districts. And section 6 extended certain other enactments throughout the whole of the territories now subject to the government of the Lieutenant-Governor of Bengal except the scheduled districts subject to such Government. The term "British India" has been declared to be thus defined in all Acts made by the Governor-General in Council unless there was something repugnant to the subject or context thereof. "British India" shall mean the "territories for the time being vested in Her Majesty by Statute 21 and 22 Vic., c. 106," and that Statute, section 1, declares that "the government of the territories now in the possession or under the government of the East India Company \* \* \* \* shall cease to be vested in, or exercised by, the said Company, and all territories in the possession or under the government of the said Company \* \* \* \* shall become vested in Her Majesty \* \* \* and, for the purpose of this Act, India shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such right as aforesaid."

So far, then, as the terms of the Regulations and Acts of the Government in its legislative capacity, it would seem that the territory of Mohurbhunj is "British India," and, unless specially exempted, is subject to the same laws as the rest of British India. But it seems to me that, although Mohurbhunj is British India, and, although the Acts of 1874 declared what was the law for British India, inasmuch as the concluding sections of Regulations XII., XIII., and XIV. of 1805, which expressly excluded the Tributary Mehals "for the present" from the operation of the general law of the country, we cannot rightly

hold that the general terms of the Acts of 1874 override the special terms of the Regulations of 1805, and I am confirmed in this opinion on finding that, although there has been a very extensive repeal of the older Regulations and Acts, those parts of the Regulations of 1805 to which I have referred are still in force. So far, then, I am inclined to think that Mohurbhunj is British India, but at present not subject to any laws not specially extended to it.

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It is, however, contended that the fact, that treaty engagements were entered into by the British Government with the Rajahs and zemindars of these Tributary Mehals, shows that they were regarded as independent rulers, and we have been referred to a treaty engagement published at pages 181 and 185 of the 1st Volume, Aitchison's Treaties, Engagements and Sunnuds.

Now, as regards the so-called treaty engagement, it appears to me that there is nothing in its terms which recognized the absolute independence of the Rajah of Mohurbhunj from the authority of the British Government. The document is headed "Treaty Engagement executed by the Rajah of Killa Mohurbhunj, a Tributary Mehal subordinate to Cuttack in the Soobah of Orissa." By it the Rajah engages to maintain himself in submission and loyalty to the Government; to pay annually, in perpetuity for himself, heirs, and successors, 1,001 sicca rupees as *peshkush* for the said Killa; to apprehend and send to the authorities any resident of British territory who may flee into Mohurbhunj; to deliver up any ryot of Mohurbhunj who may commit an offence in British territory; and to refrain from enforcing any claim of his own on any resident of British territory, notifying the circumstance to the authorities, and acting on such orders as he might receive. He further engages to cause *rassud*, &c., to be supplied to Government troops passing through his territory, and to help them with any further assistance that might be necessary, and that he will depute a contingent force of his own troops with the forces of Government for the purpose of coercion, and the bringing of any recusant Rajah or other person into subjection to the aforesaid Government. Lastly, he relinquishes a claim on account of a ferry.

Now, it is only necessary to consider the terms regarding



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the deputation of a contingent force of his own troops by the Rajah to act with the forces of Government with a view to determine whether that constitutes any ground for supposing the exercise of an authority independent of the Government. It is notorious that, even in present days, native Chiefs in British territory, especially those in distant and jungle portions, do maintain a certain number of armed retainers; and I have no doubt that, at the time of the signing of this engagement, the number of such retainers was larger than that now existing. A body of such men known as Pykes in Orissa in Government territory existed even until a recent date. The preamble of Regulation XIII. of 1805 states that it was the practice in the Province of Cuttack, under the Mahratta Government, to vest the immediate maintenance of the peace in certain Sirdar Pykes also called Kandyets, aided by inferior Pykes under the orders and control of the said Sirdars, for whose support lands were assigned under the orders and authority of the said Government, and that the general control of the said Sirdars and other Pykes was vested at the time of conquest of the Province of Cuttack by the British arms in the zemindars, talookdars, farmers, and other holders of land within the limits of their respective estates and farms. This state of affairs, so far as regards the Province of Cuttack, with the exception of the Tributary Mehals, was discontinued by that Regulation, and it may fairly be supposed that what existed in 1805 throughout the district of Cuttack, continued in the Tributary Mehals, which were, until 1829, disconnected therefrom in 1805, and that this is what was referred to in the treaty engagement entered into by the Rajah of Killa Mohurbhunj on the 1st June of that year; in other respects, that is to say, as regards the settlement of the *peshkush* payable by the Rajah to the Government, the provisions of the treaty engagement are clearly within the terms of section 37 of Regulation XII. of 1805, and the other terms are only such as are ordinarily found in *kabuliats* executed by zemindars and farmers of the Government revenue with Government. I cannot therefore regard this engagement otherwise than as an agreement on the part of the Chief or Rajah of Mohurbhunj to the terms of the settlement concluded

with the Collector of Cuttack under section 37 of Regulation XII of 1805 such as that officer was directed to make.

So far, then, as the course of legislation and the acts of Government with regard to Mohurbhunj up to comparatively recent times, that territory has never been regarded as a Foreign State. Government have from time to time asserted their power to legislate for it, and, in bringing it within the operation of some laws, have declared that they for the present suspended further legislation. The concession of the right to adopt to the Chiefs of the Tributary Mehals under Lord CANNING'S Proclamation of 1862, and the recent change in the designation of their lands as states, instead of the term estates, which had been used for nearly 70 years, cannot alter their *status*. On these grounds, I am of opinion that Mohurbhunj is not foreign territory, but that it forms a part of British India, at present specially exempted from the operation of the laws in force in British India.

I have already referred to the indefinite character of the authority exercised by the Commissioner of Cuttack as Superintendent of the Tributary Mehals. Up to 1845 some authority was so exercised, but, by Act XXI. of that year, power was given to the Governor-General in Council to withdraw it, and he was empowered to confer whatever civil and criminal powers he thought proper on the Agent for the suppression of Meriah sacrifices and his subordinates. When that office was abolished is not very material; it is sufficient to state that the Act was repealed in 1874. But it is clear that the Commissioner of Cuttack as Superintendent of the Tributary Mehals, and the Magistrates of the districts surrounding that tract of country as Assistants to the Superintendent of Tributary Mehals, have from time to time been empowered by the Government of Bengal to exercise powers as Criminal Courts of various grades in the Tributary Mehals. We have not been informed under what authority these powers were conferred, and, looking at the state of the law which I have already discussed, I am of opinion that the Government of Bengal acted beyond its authority in so investing these officers. I have come to this conclusion, because it was thought necessary by a special legislative enact-

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ment, Act XXI. of 1845, to empower the Governor-General in Council to establish Civil and Criminal Courts in the Tributary Mehals, and to define the powers of the several grades of those Courts, and such power has been claimed and exercised by the Government of Bengal without any such authority; and next because the fact, that the Indian Councils Act, 24 and 25 Vic., Chap. LXVII., section 25, by validating all orders passed by the Government in Non-Regulation Provinces, amongst which Tributary Mehals may be fairly placed, shows that such orders were without the sanction of law, and required legal confirmation. Up to 1861 any such orders are now not open to question, but this does not affect the validity of the orders conferring magisterial powers on the Magistrate of Midnapore over Mohurbhunj.

We have been informed by the Standing Counsel, Mr. Phillips, who, having first appeared for the private prosecution, appeared for the Government, on our intimating that an officer of Government should argue the case before us on behalf of Government, that, as stated in a printed memo. from the Bengal Secretariat, which he handed up to us, the Bengal Government determined to pass "no permanent defined rules" on the subject of the relative jurisdiction of the Superintendent, Tributary Mehals, and the hill Rajahs regarding the trial of criminal offences, but "directed that the spirit of certain proposed rules "should be acted up to in all future cases, with certain limitations, and that the Rajahs should be informed that they are "ordinarily amenable to the Superintendent's Court, subject "to such instructions as may from time to time be furnished "by Government."

On 12th December 1870, the Secretary to the Government of Bengal informed the Magistrate of Midnapore that, as an *ex-officio* Assistant Superintendent of the Tributary Mehals, he was "empowered to take up for trial all offences committed "within the Tributary Mehals not punishable with death, and "to deliver judgment, to pass sentence of simple or rigorous imprisonment for a period not exceeding seven years," that his proceedings will in each case be subject to the approval and sanction of the Superintendent, Tributary Mehals, to

whom they should be forwarded, and that "the trials should  
"be conducted, as far as possible, in accordance with the provi-  
"sions of the Criminal Procedure Code."

On 8th August 1872, the Viceroy and Governor-General in Council sanctioned the proposal of the Lieutenant-Governor of Bengal to "vest the Superintendent of the Tributary Mehals, Cuttack, with the same powers as are exercised by Sessions Judges in the Regulation Districts, and with power to hear appeals from all sentences passed by any subordinate officer in Tributary Mehal cases."

On 30th April 1873, the Secretary to Government, Bengal, informed the Superintendent, Tributary Mehals, that "the  
"Lieutenant-Governor authorized him to exercise the powers  
"of a Magistrate of a district, the powers of a Sessions Judge  
"under section 15, Chapter III. of the new Criminal Procedure  
"Code, and power to hear appeals from sentences under section  
"36"

But the Tributary Mehals being British India, and being specially excluded from the operation of all the laws in force in British India unless expressly extended to them as I have above stated, I can find no authority for those orders of Government conferring powers on particular officers over criminal offences committed within the Tributary Mehals.

It appears to me that, until so expressly declared by a legislative enactment, there were no penal laws in force in the Tributary Mehals, and that consequently there was no authority to invest officers with certain powers to administer an unknown and uncertain penal law. We have been informed on the authority of Hunter's Statistical Gazetteer, Vol. XIX., page 198 (an authority not binding on us), that the Penal Code was, by order of the Government of India, dated 18th December 1860, declared applicable to the Tributary Mehals. No such order can be found in the Government Gazette, for we have on inquiry been unable to obtain it from the offices of the Government of India. But it would also seem from what has taken place in the proceedings now before us that the jurisdiction of the Rajah of Mohurbhunj in Mohurbhunj is admitted, but that jurisdiction is, it is said, subordinate to that of the Super-

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intendent, Tributary Mehals, who can interfere with his proceedings. The Superintendent has been vested with certain powers under the Code of Criminal Procedure, and he has been told by Government that "trials should be conducted, as far as possible, in accordance with the provisions of the Criminal Procedure Code;" but that Code gives the power of withdrawing cases from one Court and transferring them to another only to a High Court or the Local Government. If he was acting under the Code, he exceeded his powers; but, as I have before said, I can find no authority for such interference at all.

Next, even supposing the case to have been lawfully withdrawn from the Rajah of Mohurbhunj, I can find no authority for the Magistrate of Midnapore trying it, either as Magistrate or as *ex-officio* Assistant Superintendent of Tributary Mehals in Midnapore.

For all these reasons, I am of opinion that the Rule must be made absolute, and that the proceedings taken before the Magistrate of Midnapore or Assistant Superintendent of Tributary Mehals must be declared to have been without jurisdiction, and of no effect.

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## [CRIMINAL JURISDICTION.]

J WOOD

AND

THE CORPORATION OF THE TOWN OF CALCUTTA.

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*Magistrate, Disqualifying interest of—Irregularity in proceedings by reason of interest of Judge—Interest of Judge—Prosecutor, Trial by servant of—Justice of Peace—Act IV. (B. C.) of 1876, sections 75, 77, 78, 79, 346, and 351—License for trades or professions—Proceeding under License Act—Assessment.*

A, who was alleged to have carried on the business of a boarding-house-keeper in Calcutta in 1880 without a license under Act IV. (B. C.) of 1876, was summoned by B, an officer of the Corporation and a Justice of the Peace, on the 29th March 1881, at the instance of the Corporation.

The matter was subsequently heard by B, and it appeared that notice of assessment (which assessment had been confirmed by the Chairman of the Corporation) under a particular class had been served on A; that A then denied his liability to assessment, but had not appealed against the assessment under section 79 of the Act, and had not paid the amount at which he had been assessed.

Evidence was tendered by A to show that he had not carried on the business of a boarding-house-keeper, and that he was not liable to take out any license. This evidence B refused to hear on the ground that, there having been no appeal, the Chairman's decision confirming the assessment was final under section 79, and he convicted A, and sentenced him to a fine.

A thereupon applied to the High Court under section 147 of Act X. of 1875.

*Held* that the refusal to receive the evidence tendered by A was illegal on the ground that the decision of the Chairman under section 79 had reference only to the class under which a particular person, who *admittedly* was bound to take out a license under section 75, should be assessed, and did not apply to the case in which a person denies his liability to take out a license at all, the question in such a case being one which could only be determined judicially after taking evidence in a com-

1881     petent Court in a prosecution under section 77, the *onus* being on the prosecutor.

J. WOOD     *Held*, further, that the proceedings and conviction were illegal on the ground  
 v.     that, by his connection as servant with the Corporation, B had such an interest,  
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Statement.  
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**R**ULE to show cause why an order passed by Mr. O. C. Dutt, an Honorary Magistrate of Calcutta, dated the 29th March 1881, should not be set aside as illegal.

The petitioner in this case was a Mr. Wood, who resided at No. 5, Wood Street. At the instance of the Corporation of the Town of Calcutta, he was, on the 29th March 1881, summoned under the License Act, IV. (B. C.) of 1876, for not having taken out a license for the trade or profession carried on by him at No. 5, Wood Street, as a boarding-house-keeper.

In pursuance of that summons he was arraigned before Mr. O. C. Dutt, a Justice of the Peace and the Collector to the Corporation, and was by that officer convicted and fined Rs. 60.

It appeared that, on the 31st January 1881, one Mr. O'Brien Moore, who was described as License Inspector to the Corporation of the Town of Calcutta, assessed Mr. Wood as a boarding-house-keeper under class 2, Schedule III. of Act IV. of 1876, and caused a notice to be served upon him to pay the required license-tax for the past year, *viz.*, 1880, whereupon Mr. Wood informed the License Inspector that 'he was not liable to take out a license, as he was not a boarding-house-keeper, and had not carried on any such business in the year 1880. His denial was not accepted, and the assessment having been confirmed by the Chairman, he was informed that, under section 79, he must pay Rs. 50 as his license-tax, or appeal against the assessment within fourteen days after depositing that amount as required by that section. No appeal having been preferred, on the expiration of the fourteen days, *i. e.*, on the 28th February last, an application for a summons against Mr. Wood under section 77 of the Act was made to Mr. O. C. Dutt, who was also employed as the Collector of Taxes under the Corporation. The summons having been granted, the case

was heard by Mr. O. C. Dutt on the 29th March 1881. Mr. Wood, through his pleader, admitted the receipt of the notice of assessment under section 79, but contended that he was not liable to take out a license, as he was not a boarding-house-keeper. Mr. O. C. Dutt examined, on behalf of the prosecution, Mr. Moore, who proved that the petitioner was assessed by the Chairman under class 2 as a boarding-house-keeper, carrying on business as such during 1880, and that the notice of the assessment having been given, the petitioner did not appeal against that assessment, nor was the amount assessed paid.

Evidence was tendered by Mr. Wood to prove that he was not carrying on the business of a boarding-house-keeper, and that he had not carried on such business during the year 1880.

This evidence Mr. Dutt refused to hear; and convicted Mr. Wood, and fined him Rs. 60.

Mr. Wood thereupon moved the High Court under section 147 of Act X. of 1875, and obtained a rule to show cause why the record should not be called up and the conviction quashed.

*Sale*, for the Petitioner.

*Bonnerjee, Contra.*

*Sale*.—The conviction and sentence are illegal, as the Magistrate before whom the case was tried had a personal interest in the matter from his position as servant of the Municipality—*Dimes vs. Grand Junction Canal*, 3 H. of L. C. 793. There Lord CAMPBELL says: "It is of the last importance that the maxim, 'that no man is to be a judge in his own cause,' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." In that case a bill in Equity was filed by an incorporated Company, and a decree was made by the Lord Chancellor; but the decree was afterwards set aside on the ground that the Lord Chancellor was himself a shareholder in the Company.

The case of *Reg. vs. Bholanath Sen*, 1. L. R., 2 Cal. 23, was a case somewhat similar to the present. Their the jailor in a district jail was charged with falsifying his books and defrauding the Government, and the charge was heard by a Bench of

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Magistrates, one of whom was the Officiating Superintendent of the jail; the jailor was convicted, but the conviction was afterwards quashed, partly on the ground of the interest of the Superintendent. MACPHERSON, J., said: "It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest."

So, in *Reg. vs. Mukta Singh*, 4 B. L. R., Ap. Cr., 15, NORMAN J., laid it down as a broad principle that a Judge was incapacitated from trying a case in which he had either a pecuniary or a personal interest.

In the mofussil, where officers hold several appointments, it might be inconvenient to lay it down that no proceedings should be valid if the Magistrate or other officer before whom it was had should have had any interest, official or otherwise, in the matter. But here there were a great many Justices, and no inconvenience could arise.

[MITTER, J.—What interest do you allege the Magistrate in this case had?]

I do not say it was a pecuniary interest, but it was an interest which might have influenced his decision. It is not necessary to show that it did influence, or even that there was a probability that it would influence, his decision—*Dimes vs. Grand Junction Canal*, 3 H. of L. C. 793. It is sufficient to show even the remotest possibility of the Magistrate's decision being influenced.

In *Reg. vs. Hira Lal Das*, 8 B. L. R. 422, it was decided by a Full Bench that the proceedings of a Magistrate who tried a case under the Registration Act were not illegal by reason merely that the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted by him in his capacity of Sub-Registrar. The Full Bench, however, considered that, where a prosecution was instituted by a person in one capacity, it ought not to be tried by that person acting in another capacity.

The petitioner has been seriously prejudiced by the procedure adopted. The Magistrate has refused to hear him. He considered that, as an appeal was provided by section 79,

and that as the petitioner had not appealed, he was precluded from raising any defence. But section 79 refers solely to the case of a person properly assessed, but under a wrong class. It has no application to the circumstances of the present case. The word 'class' points to that construction. The clause is semi-penal, and must be strictly construed. The Magistrate clearly acted illegally in shutting out the defence.

[Mr. Sale was proceeding to read the affidavits with a view to showing that the petitioner was not a trader, when he was stopped by the Court.]

*Bonnerjee*.—As to the first point—the Magistrate had no personal or pecuniary interest in the matter. The Act distinctly lays down that any Justice of the Peace may try any case within the meaning of the Act. The Act further provides for special officers in appeals under section 79.

[MITTER, J.—Sections 78 and 79 must be read together. No assessment can be made until a license has been applied for. If no application be made, the Municipality may proceed under section 77.]

It is sufficient that the Chairman has determined in what class a person is to be assessed.

[MITTER, J.—The Chairman's functions do not arise until the question has arisen under what class a license is to be granted, and that question cannot arise until an application has been made. If no license is taken out, then, if proceedings are taken under section 77, it may be shown that the law has not been contravened.]

[MACLEAN, J.—What evidence was there under section 77?]

Merely the evidence that the Chairman had made an assessment.

The contention of the other side, if unheld, will render the Act unworkable, as it was never intended that persons in the position of Mr. Dutt should be precluded from dealing with cases of this kind. The old Justices were all members of the Municipal Corporation, and thousands of similar cases have been heard and determined by them.

If it appears that the course which has been taken has

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precluded evidence which ought to have been received, there appears to be no objection to the case being sent back for trial on the merits.

[Sale.—If that be so, the right of appeal will be lost entirely.]

Judgment.

*Sale*, in reply.—The order of the Magistrate may not be void, but it is voidable on objection taken—see the remarks of Lord BROUGHAM on *Dimes vs. Grand Junction Canal*, 3 H. of L. C. 791.

[Mr. Sale also referred the Court to the following cases: *Queen vs. Meyer*, 1 Q. B. D. 173; *Queen vs. Milledge*, 4 Q. B. D. 332; and *Queen vs. Gibbon*, 6 Q. B. D. 168.]

The following judgments were delivered by the High Court (1):—

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MITTER, J. (after stating the facts as above):—

Mr. O. C. Dutt refused to hear the evidence that was tendered on behalf of the petitioner on the ground that the Chairman's assessment having become *final* under the last para. of section 79, the question—whether he was liable to take out a license under section 75—could not be re-opened. One of the grounds upon which the conviction has been questioned is, that this view of the law is not correct.

The other ground upon which the conviction has been questioned is, that Mr. O. C. Dutt, by reason of his connection with the Corporation of the Town of Calcutta, as their Collector of Taxes, was incompetent to try this case.

I am of opinion that the proceedings and the ultimate conviction are illegal. In the first place, it seems to me that Mr. O. C. Dutt was not right in convicting the petitioner without allowing him to substantiate his defence by evidence. The construction put upon the word 'final' in the last paragraph of section 79 is, in my opinion, not correct. The decision of the Chairman or Vice-Chairman has reference only to the class under which a particular person, who is *admittedly* bound to take out a license under section 75, should be assessed. The decision referred to herein is what is referred to in section 78, which is as follows:—

(1) MITTER and MACLEAN, JJ.

"The Chairman or some other officer authorized by him in that behalf shall determine under which of the classes mentioned in the third schedule every person to whom a license may be granted shall be assessed, and the Chairman may, in his discretion, remit the payment of license-tax, either in whole or in part, to any person classified under class 5 or 6 of the third schedule."

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The language of the section does not authorize the Chairman to determine (when the fact is denied) whether a particular person is bound to take out a license under section 75. He shall determine *under which of the classes* mentioned in the third schedule every person to whom a license may be granted shall be assessed. Therefore, if the Chairman be of opinion that a particular person is liable under the Act to take out a license, and, if that person denies his liability, the question can only be determined *judicially*, i. e., after taking evidence by a competent Court in a prosecution under section 77.

Section 346 of the Act says that "the Commissioners may direct any prosecution for any public nuisance whatsoever, and may order proceedings to be taken for the punishment of any person offending against any of the provisions of this Act." It was under the provisions of this section that the prosecution in this case was commenced. Certainly, before a conviction could be had, the prosecution was bound to prove that the accused had offended against "any of the provisions of this Act." If the view of the law taken by Mr. O. C. Dutt is correct, it is not for the Magistrate, before whom the accused is prosecuted, to determine that question, but he is bound to accept the decision of the Chairman, who virtually stands in the position of a prosecutor. It is clear to me that this view is not warranted by any of the provisions of the Act in question. The conviction is therefore, bad upon this ground.

As to the other objection, it is clear upon the authorities (see *Queen vs. Meyer*, 1 Q. B. D. 173; *Queen vs. Milledge*, 4 Q. B. D. 332; *Queen vs. Gibbon*, 6 Q. B. D. 168) that, if Mr. O. C. Dutt had been a member of the Corporation, he would have been disqualified, not only to take part in the final hearing, but also to issue the original summons.

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Judgment.

MITTER, J.

Whether the principle upon which these cases have been decided should not be applied to the case of a servant of the Corporation, sitting as a Judge, is the question which we have to decide with reference to this objection.

The reason of the rule is, that a person, who by his interest, pecuniary or personal, is likely to have a bias in the matter of the prosecution, ought not to sit as a Judge. Having regard to the reason of the rule, I think that the principle of the cases cited above should be extended to the case of a person who is connected with the Corporation in the same way as Mr. O. C. Dutt.

The proceedings and the conviction must, therefore, be quashed.

MACLEAN, J.

MACLEAN, J.—The petitioner, J. Wood, was convicted before Mr. O. C. Dutt, Justice of the Peace, of having exercised the trade, profession, or calling of a boarding-house-keeper in 1880, without having taken out a license as required by section 75 of Act IV., 1876 (B. C.). A fine of Rs. 60 was imposed under section 77 of the Act.

The record has been called up to this Court under section 147, Act X. of 1875, on the petitioner's application. His chief ground for invoking the interference of this Court is, that he was not allowed to enter into a defence showing that he did not exercise a boarding-house-keeper's calling in 1880, but objection is also taken to Mr. O. C. Dutt's competency to deal with the case, as, besides being a Justice of the Peace, he occupies a post as Collector of Taxes under the Corporation of Calcutta, the prosecutor in the case.

To commence with the first point, the case stands thus: By some unexplained interpretation of the law, it seems to be the practice for the officers of the Corporation to take the initiative, and assess persons who may be considered fit subjects for assessment. This does not seem to be what the law intends. The law requires every person who exercises a specified profession, trade, or calling, to take out a license yearly (section 75), and it renders such persons liable to fine for exercising the specified profession, &c., *without a license* (section 77). There is nothing which calls upon the Corporation to assess a person who has not applied for a license.

Now, Wood has admittedly not applied for a license of any sort, and if he exercised the calling of a boarding-house-keeper without a license, he is justly liable to a fine under section 77. But, as in all criminal cases, the *onus* of proving that Wood exercised the calling lay upon, and has not been discharged by, the prosecutor.

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J. WOOD

THE CORPORATION OF  
THE TOWN OF  
CALCUTTA.

Judgment.

MACLEAN, J.

According to the prevailing practice, Inspector Moore "assessed" Wood as a boarding-house-keeper at the close of January 1881, and the Chairman "determined the class" of the license Wood was to take. I have no doubt this was not any part of the Chairman's duty under section 78 in the absence of any application from Wood. The absurdity of assessing any one for 1880 in February 1881 becomes apparent on reference to section 76. A license taken out in 1881 would take effect for that year. However, Wood was informed of the class under which he had been assessed (section 79) on the 14th February 1881, and though he would have been perfectly justified in disregarding the notice of an officious and illegal assessment, he went to the office of the Corporation and made some inquiries, but up to the 28th February he made no appeal.

The period of limitation prescribed by section 361 would have expired on the 28th February, and, on that date, Inspector Moore applied for a summons, which was issued by order of Mr. O. C. Dutt, and the case came on before him on the 29th March.

At the trial that Justice adopted a course which had the effect of closing Wood's mouth. He held (following, he says, legal opinion) that, no appeal having been preferred under section 79, the Chairman's decision was final, that is to say, Wood not having taken out a license, was not entitled to go into evidence to show that he was not in 1880 a boarding-house-keeper, because the Chairman had, in 1881, determined that he was to be assessed under Schedule III. The point seems to me to be so utterly untenable that it is waste of time to discuss it. The simple issue for trial under section 77 was whether Wood had exercised a particular trade or calling or not, and whether the Chairman had assessed him, and whether

1881 he had appealed or not, had no conceivable connection with  
 J. Wood that issue.

v.  
 THE COR- The proceedings of the 29th March must, therefore, be set  
 PORATION OF aside on this ground.  
 THE TOWN OF  
 CALCUTTA.

Judgment. As to the other point, as far as I have been able to discover,  
 MACLEAN, J. Mr. O. C. Dutt is not a member of the Corporation, but  
 he holds the office of Collector under the Corporation, being  
 remunerated by a percentage on bills issued for collection of  
 taxes. He has, it is admitted, no interest in the collection of  
 license-tax, or carriage or house tax. He had, therefore, no  
 personal interest in the result of this case against Wood; but  
 he is undoubtedly a servant of the prosecutor, *i. e.*, the Corpo-  
 ration, and, in my opinion, his sitting as a Judge was illegal.  
 If he had been a member of the Corporation, he would have  
 been absolutely disqualified from sitting, *and from issuing a*  
*summons* (see *Q. vs. Milledge*, 4 Q. B. D. 332, and *Q. vs. Gibbon*,  
 6 Q. B. D. 168). But, although these cases do not, I think,  
 directly establish that a servant of the Corporation is disquali-  
 fied to act as a Justice of the Peace, the principle seems to  
 me to apply with greater force to a Justice who is a servant  
 than to a Justice who is a member of the Corporation. On this  
 ground also, therefore, the proceedings must be set aside.

## [CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF JUGUT MOHINI DASSEE }  
AND MADHU SUDHAN DUTT . . . . }... APPELLANTS.

1881  
Dec. 13th.

No. 658 of  
1880.

*Sanction to prosecute—Criminal Procedure Code (Act X. of 1872), section 468—  
Indian Penal Code (Act XLV. of 1860), section 211—Abetment of bringing  
false charge—Misdirection.*

There being nothing in the law requiring that sanction to prosecute under section 211 of the Indian Penal Code should only be granted upon application by a private prosecutor, a District Magistrate is competent under section 468 of the Code of Criminal Procedure of his own motion to direct a prosecution where a complaint has been entertained and found to be false by a Magistrate subordinate to him.

There being no abetment of an offence after it has been committed, a person cannot be convicted of abetting the offence of instituting a false charge on evidence which shows only that he gave evidence in support of a charge found to be false.

Duty of Judge in charging a Jury discussed.

**A**PPEAL from a conviction and sentence passed by-

*M. P. Gasper* and *Baboo Sharoda Churn Dutt*, for the Appellants.

The facts sufficiently appear in the judgment of the High Court (1), which was as follows:—

The learned Counsel for the appellant has contended, in the first place, that the proceedings in this case are all void, because there was no proper sanction by competent authority for the prosecution of either of the prisoners. And he has, in the next place, contended that the Sessions Judge misdirected the Jury



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DASSE

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SUDHAN

DUTT.

*Judgment.*

in several important particulars, so that the conviction ought not to be sustained. As to the sanction, it has been contended that there was no complaint, and that, therefore, there could be no sanction given, no application for it having been made. And that, by section 142, Criminal Procedure Code, the Magistrate was not competent to take cognizance of the offence without complaint unless sanction had been granted. We are disposed, however, to hold that there was legal sanction as to each of the prisoners.

Jugut Mohini instituted her complaint before the Magistrate of the District. He referred it to a Deputy Magistrate, one of his subordinates. That officer examined the complainant's witnesses, and dismissed the case, disbelieving the story of the prosecution. The District Magistrate thereupon directed a prosecution under section 211, and sent the case to the Joint Magistrate. We think that the District Magistrate was fully competent to grant sanction under section 468 of the Criminal Procedure Code, and that his order to prosecute was the most emphatic sanction he could give. His order therefore gave the Joint Magistrate full jurisdiction to take cognizance of the case against Jugut Mohini. There is nothing in the law which, in our opinion, requires that sanction to prosecute shall only be granted upon application by a private prosecutor.

Then as to the case of Madhu Sudhan Dutt, there is even less reason for the contention that there was no legal sanction. His evidence was given before the Deputy Magistrate. On going into the case against Jugut Mohini, the Joint Magistrate was of opinion that Madhu Sudhan ought to be prosecuted for abetment of a false complaint, and for giving false evidence. Sanction was required only in respect of the latter offence. The Joint Magistrate applied for sanction to the District Magistrate, who accorded it; and, as he was the Court to which the Deputy Magistrate was subordinate, he was competent, under section 468 of the Criminal Procedure Code, to grant sanction.

As to the validity of the proceedings, therefore, the appeal must fail.

We have now to consider the Judge's direction to the Jury. It is in truth a very meagre one; and deals with a small portion only of the evidence. The Sessions Judge commenced by saying that "as the trial had been protracted over four days, and as the Jury had heard very long arguments on both sides, he would not go into the details of the evidence." But we think that the reasons given should certainly have induced him to lay before the Jury clearly, though concisely, the evidence as affecting each of the accused severally; not only what told against them, but also any that might be in their favour.

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—  
*Judgment.*  
—

As regards the prisoner Jugut Mohini, there was a clear misdirection by the Judge in respect of the ornaments of which she had complained that she had been robbed. The only evidence on this point to which the Judge called the attention of the Jury, and which he directed them, was sufficient for the conviction of Jugut Mohini of making a false complaint, was the testimony of certain witnesses as to what the prisoner Madhu Sudhan had admitted to the arbitrators. This was not admissible evidence as against Jugut Mohini. Again, as to the dhan, and as to the bullocks, the Judge drew the Jury's attention only to that portion of the evidence which went to show that, at the time of the alleged robbery, there was neither dhan nor bullock on Jugut Mohini's premises, and did not point out that there was also, as has been shown by the learned Counsel, evidence to the contrary. The omission to lay this before the Jury was also a misdirection of a character very prejudicial to the prisoner.

We think that the conviction obtained upon such misdirections as we have noticed should not be sustained. We accordingly set it aside; and, under the circumstances which led the Judge to pass a light sentence, of which the prisoner has clearly undergone the greater portion, we think that we ought not to order Jugut Mohini Dassee to be re-tried. She will therefore be discharged from bail.

And, as regards the prisoner Madhu Sudhan Dutt, the misdirection on the points touching the dhan and the bullocks was equally prejudicial to him. We find moreover that the

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*In re*JUGUT  
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and  
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DUTT.*Judgment.*

Judge entirely misdirected the Jury to convict him of abetment, for no evidence was put before them in the charge tending to show that he abetted the complaint. That he gave evidence in support of it is no proof of abetment. That offence must be committed either before or at the time when the act abetted is committed. There is no abetment of an act after it has been committed.

Further, we do not find anything in the Judge's direction showing that the false evidence, if given by Madhu Sudhan, was such as is punishable under section 195 of the Penal Code, under which section he has been convicted.

Lastly, we must point out that the Code of Criminal Procedure does not authorize the Court to pass a consolidated sentence for two or more offences.

We think that, regard being had to the misdirections above noted, the conviction of Madhu Sudhan Dutt cannot be sustained. We direct that he be re-tried.

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## [CRIMINAL APPELLATE JURISDICTION.]

1881  
July 29th.  
No. 349 of  
1881.

IN THE MATTER OF THE PETITION OF KHAMIR . . APPELLANT.

*Penal Code (Act XLV. of 1860), sections 114, 376, 497, 498—Criminal Procedure Code (Act X. of 1872), sections 283 and 296—Discharge—Commitment, Order for, by Sessions Judge after discharge by Magistrate—Commitment, Omission to allow accused to show cause against—Irregularity.*

Under section 296 of the Criminal Procedure Code, a Sessions Judge has power to direct a subordinate Court to inquire into offences in respect of which he considers a commitment to the Sessions Court should be made; but, where a person accused of an offence has been discharged under section 215 of the Criminal Procedure Code by a Magistrate duly empowered to try the offence, a Sessions Judge has no power to order the commitment of the accused without at least giving him an opportunity of showing cause against it.

Where, however, such a commitment has been made, and a trial had thereunder, section 283 of the Criminal Procedure Code is a bar to the reversal of the judgment of the Sessions Court unless there has been an actual failure of justice caused by his error.

THIS was an appeal from an order of the Sessions Judge of Mymensingh dated the 19th May 1881.

The accused in this case was charged before a Deputy Magistrate with second-class powers, under section 498 of the Penal Code, with enticing, or taking away, or detaining, with criminal intent, a married woman. He was, however, discharged under section 215 of the Criminal Procedure Code.

An application under section 296 of the Criminal Procedure Code was thereupon made by the complainant to the Sessions Court, and the Judge, being of opinion that the facts alleged amounted really to abetment of rape, or of adultery, directed the Deputy Magistrate to commit, under sections 114 and 376 and 114 and 497 of the Penal Code, the accused to the Sessions, the offences being triable by a Sessions Court only.

[CRIMINAL.]

C. L. R. 93.—a.

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The accused was committed accordingly to take his trial before the Sessions Court.

The assessors were of opinion that the accused was guilty of an offence under sections 114 and 497 of the Penal Code. The Sessions Judge, however, differed from the Assessors, finding that the accused had committed an offence under sections 114 and 376 of the Penal Code, and he sentenced him to 4 years' rigorous imprisonment.

Against the order under which he was committed, and against the conviction and sentence, the prisoner has preferred this appeal.

Baboo *Grish Chunder Chowdhry*, for the Appellant.

The judgment of the High Court (1), which was as follows, was delivered by

MORRIS, J. — In this appeal it is contended first that the order under which the appellant was committed to take his trial in the Court of Session is, on two distinct grounds, illegal and *ultra vires*; and, next, that, on the merits, the prisoner ought not to have been convicted.

The case had been instituted against the prisoner under section 498 of the Penal Code. The Deputy Magistrate, after hearing the evidence for the prosecution, discharged the accused under section 215, Criminal Procedure Code.

The complainant then moved the Sessions Judge to take action under section 296, Criminal Procedure Code. That officer was of opinion that the facts alleged against the accused really amounted to abetment of rape, or of adultery, and, those offences being triable only in the Sessions Court, he directed the Deputy Magistrate to commit the accused accordingly.

He remarked that, even if the case properly came under section 498, the Deputy Magistrate had no power to try it, inasmuch as he was vested with only second-class powers. This dictum is opposed to the provision made in Schedule IV. of the Criminal Procedure Code in regard to section 498 of the Penal Code. It is quite clear, however, that the case before the Deputy Magistrate was one under section 498; and that he, being duly

empowered by law to try such a case, discharged the accused under section 215. The Sessions Judge had, therefore, no power to order a commitment under sections 376 and 497. He had, under the proviso added to section 296 of the Criminal Procedure Code by Act XI. of 1874, power to direct the subordinate Court to inquire into these offences, but no more. In ordering the commitment the Judge unquestionably transgressed the law.

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*Judgment.*  
 MORRIS, J.

It further appears upon an affidavit made on behalf of the appellant that the order for his commitment was made by the Judge without giving him any opportunity of showing cause against it, which procedure is not in accordance with what the High Court has laid down on this subject. See *Re Bundhoo*, 22 W. R., Cr., 67; *Nowab Singh vs. Kokil Singh*, 24 W. R., Cr., 70; and *In re Dwarkanath Bhattacharjee*, 1 C. L. R. 93. It has been submitted that the trial and conviction ought to be set aside for the two reasons above set forth. These are no doubt serious irregularities; and more especially the first, which is a direct transgression of the law; and, if they had been brought to the notice of this Court before the trial had taken place, the commitment would properly have been quashed: but, as the trial has been held, and as we do not consider that any actual failure of justice has been caused by the errors, we are disposed to hold that section 288 of the Criminal Procedure Code is a bar to the reversal of the judgment on these grounds. • • •

[The learned Judge then proceeded to consider the merits of the case, and, in the end, set aside the conviction.]

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## [CRIMINAL APPELLATE JURISDICTION.]

1881  
Dec. 14th.  
—  
No. 59 of  
1881.

IN THE MATTER OF SAMIRUDDIN . . . . . APPELLANT.

*Deposition of dying person as to cause of death—Dying declaration, Proof of—  
Evidence—Medical evidence.*

In a capital-sentence case referred to the High Court, the only opinion of a Surgeon as to the cause of death of the deceased which can be judicially considered is the opinion expressed by him under examination as a witness.

A statement made by a dying person as to the cause of his death, and recorded by a Magistrate, cannot be treated as a deposition unless made in the presence of the accused before the Magistrate exercising judicial jurisdiction, but must be proved in the ordinary way by a person who heard it made.

**A**PPEAL from a conviction and sentence passed by the Officiating Judge of Furidpore. The proceedings were also referred for confirmation under section 287 of the Criminal Procedure Code.

In referring the case, the Sessions Judge forwarded a certificate, as to the cause of death of the person whom the prisoner was found guilty of having murdered, made after the trial by the Civil Surgeon of the District.

The facts necessary for this report appear from the judgment of FIELD, J.

The following judgments were delivered by the High Court (1):—

FIELD, J.

FIELD, J.—In this case one Samiruddin has been convicted of murder by the Sessions Judge of Furidpore sitting with Assessors, and has been sentenced to death. This sentence has been referred for confirmation, and the prisoner has appealed at the same time.

In referring the case, the Sessions Judge forwards a copy of a letter received by him from the Civil Surgeon, and express-

ing an opinion as to the nature of the wound inflicted upon the person, of causing whose death the prisoner has been convicted. We cannot receive, or in any way act upon, this extrajudicial matter. The only opinion of the Civil Surgeon which can be considered in judicially dealing with the case is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected.

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*In re*  
SAMIRUDDIN.  
*Judgment.*  
FIELD, J.

The Assessors were of opinion that the prisoner should be convicted of murder. But the value of this opinion is very much diminished when we find that some important matter, which should not have been admitted as evidence, was admitted to influence their minds. The piece of evidence to which this observation relates is the dying statement of the deceased, Bahir Ali. This was recorded by the Deputy Magistrate as a "deposition," but it does not appear that Bahir Ali was examined in the presence of the accused Samiruddin; and, unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made.

The prisoner was charged with "causing the death of one Baul Mir, *alias* Bahir Ali, by inflicting on him a wound with a chheni, with the intention of causing bodily injury such as was sufficient in the course of nature to cause death, or which he knew to be likely to cause death." This charge was probably intended to refer to the second and third clauses of the definition of murder contained in section 300 of the Penal Code, but it is defective and inexact as regards both clauses. With reference to the second clause, it should have run thus: "likely to cause the death of Bahir Ali, the person to whom the harm was caused." With reference to the third clause it should have said "ordinary course of nature."

The medical evidence in the case is the deposition of the native doctor, who was not examined in the Court of Session



1881  
*In re*  
 SAMIRUDDIN.  
*Judgment.*  
 FIELD, J. as, we think, he should have been. This deposition goes to show that deceased "died from gangrene of the left lung and pleura" brought on by the injuries observed on his body. The native doctor further says that the wound inflicted on the deceased was sufficient to bring on gangrene.

There is no evidence that the injuries were sufficient in the ordinary course of nature to cause death. There is no evidence that gangrene was a likely or probable result of the injuries inflicted, or that death was a likely or necessary result of gangrene. The native doctor was not even asked, and did not say, whether the injuries inflicted were likely to cause death.

Upon the evidence on the record we think that the prisoner cannot be convicted of murder, or of culpable homicide not amounting to murder. Upon his own confession and the evidence of the witnesses Palan Mandal and Holadhur Das, we are satisfied that he wounded or injured the deceased with a chheni; and we think that he ought to be convicted under section 326 of the Penal Code of causing grievous hurt by a dangerous weapon. We set aside the conviction and sentence for murder; and, convicting the prisoner Samiruddin under section 326 of the Indian Penal Code, sentence him to ten years' rigorous imprisonment.

PONTIFEX, J. PONTIFEX, J.—I am of the same opinion.

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## [CRIMINAL REFERENCE.]

## IN THE MATTER OF DIANUT HOSEN.

1881  
Dec. 8th.

S

No 810 of  
1881.

*Criminal Procedure Code (Act X. of 1872), section 296—Revisional Jurisdiction of High Court in criminal matters—Collector whether subject to criminal revisional jurisdiction of High Court.*

A Collector as such, not being subject to the revisional jurisdiction of the High Court in criminal matters, that Court, in the exercise of such jurisdiction, is not competent to deal with an alleged illegal order made under the Indian Penal Code by a Collector.

THIS was a reference submitted under section 296 of Act X. of 1872 by the Sessions Judge of Bhaugulpore under the following circumstances: The Collector of Monghyr, in a butwara-proceeding, fined a mukhtear named Dianut Hosen under section 182 of the Indian Penal Code for making false statements when appearing in support of a petition presented by his client. The Sessions Judge was of opinion, that the fine had been illegally imposed, inasmuch as the Collector had no jurisdiction to pass a sentence under section 182 of the Indian Penal Code; but, the Collector not being subordinate to the Sessions Court, he considered it his duty to forward the matter to the High Court.

No one appeared on the reference.

The opinion of the High Court (1) was as follows:—

We think that, whatever other remedy Dianut Hosen may have for being fined by the Collector without jurisdiction, he cannot have redress from the exercise of the revisional jurisdiction of the High Court in criminal matters, a Collector of a district not being, as such, subject to such revisional jurisdiction.

## [CRIMINAL JURISDICTION.]

1881  
Dec. 7th.  
No. 28 of  
1881.

IN THE MATTER OF GIRIDHARI MONDUL } ... PETITIONERS.  
AND ANOTHER . . . . . }

*Criminal Procedure Code (Act X. of 1872), section 468—Penal Code (Act XLV. of 1860), section 211—Sanction to prosecute.*

A local investigation, upon information given by A that a dacoity had been committed, having been made under section 115 of the Criminal Procedure Code, the District Magistrate, upon the report of the inquiry made in the local investigation, without giving A an opportunity of having a judicial inquiry into the charge preferred by him, passed the following order: "B (one of the persons alleged by A to have committed the offence) is directed to bring a case under section 211 of the Penal Code," and he directed the Superintendent of Police to take charge of the prosecution.

*Held* that the order quoted could not be considered a sanction under section 468 of the Criminal Procedure Code, and that, if it were intended to be such, it was expressed in an improper manner.

*Held*, also, that the direction that the Superintendent of Police should take charge of the prosecution was given without jurisdiction, and was calculated to prejudice the person against whom the prosecution was directed.

*Held*, further, that the proceedings in the original charge not having been before a Court, no sanction under section 468 was requisite.

**M**OTION to set aside an order passed by the District Magistrate of Purneah on the 13th July 1881.

The facts are fully detailed in the judgment of FIELD, J., *infra*. The grounds on which the order was sought to be set aside are as follow:—

*Wood and Baboo Anund G. Palit*, for the Petitioners.

*The Deputy Legal Remembrancer*, for the Prosecution.

The following judgments were delivered by the High Court (1):—

FIELD, J.—The facts of this case are as follow: On the morning of the 25th May last, Mr. Pratt, the Joint Magistrate of Purnea, riding along in a portion of the District, when one Chamroo Mondul came to him, and complained that a dacoity had been committed on the previous night in the house of his brother, Giridhari Mondul. Mr. Pratt immediately proceeded to the spot and made, what we must assume to be, a preliminary enquiry under the provisions of section 115 of the Code of Criminal Procedure, or what is commonly called a local investigation, conducted, not in his judicial capacity as Joint Magistrate, but in his administrative or executive capacity as a police-officer. To this conclusion we are led by several facts. In the first place, there is no record of the examination of witnesses taken down in the manner directed by the Code of Criminal Procedure for proceedings of a judicial nature. In the second place, Mr. Pratt did not proceed to dispose definitely of the case of dacoity; and this he would probably have done if he had been acting as a judicial officer. In the third place, he forwarded, by a memorandum of the 28th May, his proceedings to the Magistrate and the District Superintendent of Police for information, and this is only consistent with the supposition that Mr. Pratt conceived himself to be acting in his administrative or executive capacity, and as a police-officer. It appears that the local enquiry made by the Joint Magistrate extending over the days intervening between and including the 25th and 28th May. On the 28th May, Mr. Pratt recorded, with some care, the investigation which he had made and the conclusion to which he was led; and, as has been already observed, this record was forwarded to the Magistrate of the District. Upon the same day, Mr. Weeks, the Magistrate, recorded certain observations expressing his concurrence generally with the conclusion at which the Joint Magistrate had arrived, but no final orders were passed upon the case. It would then appear that, in the course of some after-proceedings held before the police, or before some of the Magisterial author-

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MONDUL.

Judgment

FIELD, J.

(1) PONTIFEX and FIELD, JJ.

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*In re*GIRIDHARI  
MONDUL.*Judgment.*

FIELD, J.

ities, one Bhadoi Dosadh made certain statements as to having taken part in certain dacoities, and having received, and being in possession of, certain property taken in those dacoities. Giridhari Mondul, in whose house the dacoity on the 25th May is said to have taken place, was, upon this, sent for, together with certain members of his family, and they were examined by the Joint Magistrate on the 13th June. These witnesses did not, however, identify any of the property produced by Bhadoi Dosadh as property taken on the night of the 25th May. The Joint Magistrate, after examining Giridhari Mondul and the members of his family, released Bhadoi Dosadh on 50 rupees' bail; and, by an order dated 28th June, he transferred the case of Bhadoi Dosadh to the District Magistrate for orders. On the 6th July, the District Magistrate, Mr. Weeks, took up the case, and made the order that Bhadoi Dosadh be released from bail. Meanwhile, it would seem that no judicial proceedings were being taken upon the original charge of dacoity made by Chamroo Mondul to the Joint Magistrate on the morning of the 25th May, and no final orders had been passed upon the report of the preliminary enquiry submitted by the Joint Magistrate, Mr. Pratt. We then find that, on the 13th July, the District Magistrate took up this case, and made the following order: "Nunuhoo directed to bring a case under section 211, I. P. C." Nunuhoo is an *alias* for one Uchit Jha, whose name had been given by Chamroo Mondul and Giridhari Mondul as that of a person recognized by his voice or otherwise at the time of the dacoity. There is nothing in the papers before us to show that Uchit Jha was arrested, or that any enquiry of a judicial nature, conducted with judicial formalities, was ever made into the charge of dacoity made against this Uchit Jha and certain other persons who had been mentioned by Chamroo Mondul and his brother, Giridhari Mondul, as persons present at the time of the dacoity. It has been repeatedly pointed out by this Court that it is not a fair course towards a prosecutor to direct him to be placed upon his trial under section 211 of the Indian Penal Code without having first given him an opportunity of having a judicial enquiry into the charge originally preferred by him. In the present case it is

clear that Chamroo Mondul and his brother Giridhari had no opportunity of producing witnesses, and establishing, before an officer acting in a magisterial capacity, the charge of dacoity which had originally been made on the morning of the 25th May. We think that, under these circumstances, if the order of the 13th July, which has been already quoted, was intended as a sanction under section 468 of the Code of Criminal Procedure, it was made without proper discretion, and in opposition to what has been repeatedly laid down by this Court as the proper course to be pursued in these matters. But, upon a full consideration of the case, it appears to us that this order cannot properly be considered as a sanction within the meaning of section 468. There had been no judicial proceeding, and the offence, if any, committed under section 211, was not committed before or against a "Court." It has been decided that, in the case of a complaint made to the Police, the sanction required by section 468 is not necessary. It is further to be observed that, if this order of the 13th July was intended as a sanction under section 468, it is expressed in an improper manner—"Nunuhoo directed to bring a case under section 211." In the *mofussil*, the effect of such a direction upon a person in complainant's position of life would be, that he would feel himself constrained to carry out the direction so conveyed to him by the Chief Magistrate of the District. The sanction contemplated by section 468 is something very different from this, inasmuch as it leaves a private prosecutor free to exercise his own fettered discretion as to whether he will proceed or not. We find a further order dated the 30th August, in which the Magistrate instructs the District Superintendent of Police to direct the prosecution. We cannot suppose that the District Magistrate intended to assume in this case the functions of a public prosecutor, or that the prosecution, under section 211, was intended to be inaugurated and conducted as a prosecution on behalf of Government. This being so, we are of opinion that this further order that the District Superintendent should direct the prosecution was calculated to prejudice still further the accused persons against whom Nunuhoo was directed to bring a charge under section 211. The proceedings in the

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dacoity case not being proceedings before a Court, no sanction under section 468 was requisite; and, regarding these proceedings as proceedings merely before a police-officer, we think that the order of the Magistrate directing Nunuhoo to institute a case under section 211, and the further order directing the District Superintendent of Police to take charge of that prosecution, were made without jurisdiction, and must be set aside. We have been asked further to direct that the private prosecution instituted by Uchit Jha should determine, or, at least, that the proceedings taken upon that prosecution should be stayed until there has been a judicial inquiry into the charge of dacoity. We think that we have not jurisdiction to make an order to this effect, and that, if Uchit Jha is disposed, at his own instance, to proceed with the charge under section 211 of the Indian Penal Code, we cannot interfere to prevent him. At the same time we think it proper to observe that, if Chamroo Mondul and Giridhari Mondul desire that the original charge of dacoity should be judicially inquired into, it is not competent to the District Magistrate to refuse a judicial inquiry into that charge as originally made on the morning of the 25th May.

PONTIFEX, J.      PONTIFEX, J.—I am of the same opinion.

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## [CRIMINAL JURISDICTION.]

IN THE MATTER OF KALI CHURN CHUNARI } ... PETITIONERS. 1881  
AND OTHERS : . }

*Criminal Procedure Code (Act X. of 1872), sections 119 and 126—Police diaries—Refreshing memory.*

No. 229 of  
1881.

A prisoner has no right to insist that a police diary, if not in Court, shall be sent for, or, if it be in Court, that it be referred to for the purpose of refreshing the memory of a police-officer under examination.

*Per WILSON, J.*—A witness cannot be compelled to refresh his memory from any document unless the document is either in the possession of the party who desires to put it to the witness, or is, at least, such as he can insist on having produced.

*Reg. vs. Uttamchand Kapurchand*, 11 Bom. H. C. R. 120, approved and explained.

**M**OTION to set aside a conviction and sentence passed by the Sessions Judge of the 24-Pergunnahs on the 10th June 1881.

The petitioners in this case were convicted by the Deputy Magistrate of Baraset on the 20th May 1881, under sections 114 and 325 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment. On appeal to the Sessions Judge of the 24-Pergunnahs, the conviction and sentence were upheld on the 10th June 1881.

They now moved the High Court to set aside that conviction and sentence under the provisions of section 297 of the Code of Criminal Procedure on the following grounds set forth in their petition, *vis.* :—

*1st.*—That the Magistrate was in error in refusing to allow the petitioners' pleader to cross-examine the police-officer as to the previous statements made by the witness contained in his diary.

*2nd.*—That the diary being in Court, the Magistrate should have permitted the police-officer to refer to the same for the purpose of refreshing his memory.



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3rd.—That the Sessions Judge was wrong in his statement that the diary was not in Court when application was made on behalf of the petitioners to cross-examine the police-officer.

4th.—That the Magistrate was wrong in compelling the petitioners to enter upon their defence, and produce their evidence, before the witnesses for the prosecution had been cross-examined.

5th.—That the manner in which the Sessions Judge had dealt with the petitioners' appeal was illegal and irregular, and they have been prejudiced thereby.

6th.—That the Sessions Judge has not comprehended the actual facts and circumstances of the case and trial before the Magistrate.

Mr. H. E. Mendies, for the Petitioners.

No one appeared for the Crown.

The following judgments were delivered by the High Court (1):—

PRINSEP, J.

PRINSEP, J.—In my opinion there is no ground for our interference in this case. The objection raised is, that the Deputy Magistrate refused to the police-officer to refresh his memory from a statement of the witness which he had recorded under section 119 of the Criminal Procedure Code. It does not appear that the police-officer, when examined as a witness, desired so to refresh the memory. I think that the accused was not entitled to insist upon the police-officer refreshing his memory by referring to his notes, because, under section 126, he was not entitled himself to see these notes or any papers prepared in the course of the police-investigation, and section 119 declares that such notes shall not be treated as part of the record, or be used as evidence. The case of *Reg. vs. Uttamchand Kapurchand* in 11 Bom. H. C. R. 120 is not in point.

As regards the other objection taken, I have not been shown that, in the procedure taken by the Deputy Magistrate, the accused has been in any way materially prejudiced in his defence. It seems to me rather that the Deputy Magistrate had very good grounds for examining the witnesses for the de-

fence on the day in which they attended rather than deferring their examination until some of the witnesses for the prosecution, who were not in attendance, had appeared so that they might be cross-examined.

The application is therefore refused.

WILSON, J.—I entirely agree with Mr. Justice PRINSEP with regard to the second point. With regard to the first point, I have a very few words to add regarding the question of refreshing the memory. I entirely agree, if I may say so, with what was decided by the Bombay Court in the case cited before us. What was decided in that case was this—that, when a witness comes forward at a trial, and makes a statement contradicting his statements previously made to the police, the accused or his pleader is entitled to cross-examine him with respect to his former statement; that, if he desires it, he may be contradicted; and that one of the ways in which he may be contradicted is by calling the police-officer before whom he made the statement, who may refresh his memory from his diary. That seems to me to be the whole of the decision of the Bombay Court. But the question now before us is not whether the witness can be cross-examined as to his previous statement, nor whether the police-officer may be examined to contradict him, nor whether the officer may refer to his diary; but the question is, whether the prisoner has a right to insist that the diary, if not in Court, shall be sent for, or, if it be in Court, shall be referred to for the purpose of refreshing the police-officer's memory. I think the prisoner has no such right. I know of no authority for saying that a witness can be compelled to refresh his memory from any document unless the document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist on having produced. This is a document which the law expressly declares that the defence has no right to see. Section 126 says: "Any Criminal Court may send for the police-diaries of a case under enquiry or trial in such Court, and may use such diaries to aid it in such enquiry or trial." That is the right of the Court. "Neither the prisoner nor his agents shall be entitled to call

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*Judgment.*

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for them, nor shall he or they be entitled to them merely because they are referred to by the Court. But, if they are used by the police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer," in either of these two cases, the prisoner is entitled to see them; but, until this is done, he has no such right. Therefore it seems to me that the decision of the Deputy Magistrate is correct.

I guard against saying anything as to the mode in which a Court shall exercise its discretion in permitting the document to be used as indicated in the section. The question as to whether in this case that discretion has been wisely used or not is not before us.

## [CRIMINAL JURISDICTION.]

1881  
Sept. 24th.

No. 246A of  
1881.

IN THE MATTER OF ABDUL GUFFOOR . . . PETITIONER.

*Inspection of books, the subject of charge of theft—Statement of accused, Refusal of Court to take.*

So far as it may be necessary for the purposes of the trial, when books are the subject of a charge of theft, the accused is entitled to inspection of the books.

It is not competent to the Court in a criminal trial to refuse to allow the accused to make a statement.

**A**PPPLICATION, under section 147 of the Presidency Magistrates Act (IV. of 1875), to set aside a conviction and sentence passed by the Senior Presidency Magistrate.

*Allen*, for the Petitioner.

*M. P. Gasper*, *contra*.

The judgment of the High Court (1) was as follows:—

In this case we are of opinion that the conviction must be quashed. A number of irregularities have been shown to have occurred in the course of the trial, of greater or less importance. The first of those which we think it necessary to notice is with regard to the two books which form the subject-matter

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of the charge. It appears from the record of the proceedings that, when those books were produced and identified by one of the witnesses, the Counsel for the defence desired to examine them, but he was not allowed to do so, the Magistrates making an order that neither side should see the books—apparently a very impartial order, but practically a very one-sided one. It seems to us, without going into the question as to the extent of the inspection that the prisoner or his Counsel might be entitled to, that at least, so far as was necessary for the purposes of the trial, he was entitled to inspect the books. Speaking for myself, I wish to guard against saying that, if any one was found making undue use of these books, taking copies of them for instance, the Court would not be justified in preventing this, but it does seem to us that, for the purposes of the trial, the prisoner or those representing him were entitled to inspect the books. It is impossible to say that the examination would not have thrown great light on the subject of the guilt or otherwise of the accused. The prisoner was charged with the theft of two books from Mr. Bretton's room, and it is said for the defence that the accused did not remove the books, and that he had seen them for the first time near the gate. It is impossible to say that the examination of these books might not have thrown light on the subject of which of the two stories was the true one, or that the refusal of the Magistrates to permit an inspection, did not prejudice the accused.

The second irregularity that appears to have occurred is, that the Counsel for the accused formally asked that he should be examined, which practically means, that the prisoner should be allowed to make a statement in the first instance, and that was refused at the time, and he was not examined at any later period. That we think was a grave error on the part of the Bench.

The third error, which Mr. Gasper, appearing in support of the conviction, admitted to be an error, was allowing the Diary of the Police Inspector to be admitted as evidence. It may well be that that last error did not affect the result, but that it is a defect in the proceedings there can be no doubt. These three are all of them serious irregularities in the conduct of the

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case. It might be, however, that all these irregularities might not, in our judgment, have been sufficient reason for quashing this conviction; but there is another defect in the trial which appears to us absolutely fatal. Putting aside the error in the form of the charge, the substance of the charge was that the prisoner stole two books out of the possession of Mr. Bretton. It was necessary therefore to show that the accused person took them dishonestly, and that he took them without the consent of the person out of whose possession he took them. The story for the prosecution was, that he went up to Mr. Bretton's room along with the sirdar bearer, and that he brought away these books, telling the bearer that he had Mr. Bretton's authority for doing so. Now that would or would not be stealing, according as it was shown that the accused had or had not the permission of Mr. Bretton to remove the books, but strange there is no evidence that Mr. Bretton had not sent him, and, in the absence of such evidence, the offence charged is not proved.

It was suggested by Mr. Gasper that the line of cross-examination taken on behalf of the prisoner by his Counsel in cross examining the witnesses for the prosecution relieved the prosecution from proving that element of the crime, because the cross-examination had been addressed to show that the prisoner had never removed the books out of the possession of Mr. Bretton, but it appears to us that the cross-examination on behalf of the defendant can never relieve the prosecution from proving any essential element in the charge.

At the close of the case for the prosecution, the Counsel for the prisoner applied to the Magistrates to dismiss the case on this very ground, *viz.*, that the prosecution had not given evidence in support of their case that Mr. Bretton had not authorized the removal of the books, and we think that the case should have been dismissed on this ground.

For these reasons we quash the conviction and sentence. The accused will be discharged, and the fine, if paid, will be refunded. We desire to express no opinion as to whether an appeal lies under the circumstances of the present case. We deal with the case under section 147 of the High Court Criminal Procedure Act,

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF GOPAL CHUNDER }  
MUNDLE . . . . . } ... PETITIONER.

1881  
Sept. 9th.

No. 221 of  
1881.

*Criminal Procedure Code (Act X. of 1872), sections 278 and 279.*

The fact, that the pleader of the accused is present in Court when an order is made admitting an appeal, does not relieve the Court from the necessity of giving notice to the appellant of the day fixed for the hearing of the appeal.

**M**OTION to set aside an order passed by the Joint Magistrate of the 24-Pergunnahs, on the 28th March 1881, enhancing a sentence passed by the Deputy Magistrate on the 10th February.

Baboo *Umbica Churn Bose*, for the Petitioner.

No one for the Crown.

The following judgments were delivered by the High Court (1) :—

MITTER, J.—The petitioner before us was convicted on the 10th February last of the abetment of theft, and sentenced to pay a fine of Rs. 25, and, in default of payment, to suffer rigorous imprisonment for 15 days. The petitioner was the gomashtha of the zemindar, of whom the complainant in the case was a ryot. The facts found by the Deputy Magistrate who convicted the petitioner are these: The petitioner, on the day of the occurrence which forms the subject-matter of the charge, sent a peon named Bholanath Sirdar to the complainant to fetch him to the zemindary cutchery. Bholanath found the complainant and his brother in their field cutting their *dhan* and storing it in a *donga*. The complainant, when asked to accompany the peon to the cutchery, said that he would see the gomashtha in the evening. Whereupon the petitioner again sent the same peon with a durwan, ordering them to bring to

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MUNDLA.*Judgment.*

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the cutchery the dhan with the donga if they refused to come over there at once. On their appearance again in the field, the complainant and his brother fled, and the peon and the durwan, in accordance with the petitioner's order, took away the dhan and the donga. The value of the property mentioned above is found to be Rs. 1-4. Upon these facts being found, the peon, Bholanath, was convicted of theft, and the petitioner of the abetment of theft.

Against this conviction both the petitioner and Bholanath preferred an appeal to the District Magistrate. The petition of appeal was presented by their pleader to the Magistrate in open Court on the 5th of March last. The Magistrate, "without hearing any arguments" (as stated in the affidavit of the petitioner) passed the following order:—

"Call for record, 28th March fixed."

On the 24th March, the appeal was referred to the Joint Magistrate, who, on the 28th March, enhanced the sentence, directing that, in addition to the fine imposed by the Deputy Collector, Gopal Chunder, the petitioner before us, be rigorously imprisoned for two months, and Bholanath for one month.

The objection taken before us is, that the order of the Joint Magistrate enhancing the sentence is contrary to law, inasmuch as he could not enhance the sentence without admitting the appeal, and in support of this contention a decision of this Court—*Reg. vs. Kala Chand Lal*, 24 W. R. (Cr. Rul.) 27—has been cited.

It seems to me that, if the order of the 5th March was passed under the first part of section 278 of the Criminal Procedure Code fixing a day for hearing, the final order enhancing the sentence is undoubtedly contrary to law. If, on the other hand, it was passed under section 279, the objection must fail, unless it can be established that the notice required to be given under this section was not given to the appellant.

The District Magistrate, in his explanation, says that the order in question was passed by him under section 279, and it is therefore clear that he thought that the appeal was admitted by that order. But still we have to consider what is its legal effect.

Section 278 says that, when an appeal is presented, the Appellate Court shall fix a reasonable time within which the appellant or his Counsel or authorized agent may appear, and it may reject the appeal, if, on a perusal of the petition of appeal and the copy of the judgment or order appealed against, and after hearing the appellant or his Counsel or authorized agent, if he appears, it considers that there is no sufficient ground for questioning the correctness of the decision, or for interfering with the sentence or order appealed against. It further provides that the Appellate Court, before rejecting the appeal, may call for the record. Section 279 says that, if the Appellate Court decide to hear the appeal, it shall cause notice to be given to the appellant.

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CHUNDER  
MUNDLE.  
—  
*Judgment.*  
—  
MITTER, J.

It is clear from these two sections that the Appellate Court, under section 278, has to decide, upon the materials, then before it, whether it should reject the appeal at once, or proceed to hear it after giving notice to the appellant. In this case, on the 5th of March, the District Magistrate did not decide, after considering the materials before it, whether the appeal should be rejected at once, or should be admitted for future hearing.

According to the affidavit, which the Magistrate does not state to be incorrect upon this particular point, there was no hearing at all, nor any consideration of the materials then before him. It seems to me, therefore, that the legal effect of the order of the 5th March was that by it the Magistrate fixed a particular day for the preliminary hearing of the appeal as contemplated by section 278, and the order passed by the Joint Magistrate on the 28th should have been therefore passed under this section.

Furthermore, if the order of the 5th March be considered to have been passed under section 279, still, in my opinion, the enhancement of the sentence is contrary to law, because no notice of the day of hearing was given to the appellant. The Magistrate thinks that, as the day of hearing was fixed in the presence of the appellant's pleader, no separate notice under section 279 was necessary. I am unable to agree in this opinion. In criminal cases, the procedure laid down in the law must be strictly followed. The section in question says that the notice



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**GOPAL**  
**CHUNDER**  
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*Judgment.***MITTER, J.**

is to be given to the appellant. A substituted notice to the appellant's pleader or mukhtar is not, in my opinion, sufficient. If the Legislature intended that notice to the appellant's pleader or mukhtar would be sufficient, it would have distinctly said so, as it has done in sections 278 and 280.

For these reasons I am of opinion that the order of the 28th March last is contrary to law, and must be set aside.

With reference to the question whether the sentence of fine passed by the Deputy Magistrate was adequate or not, I think that, having regard to the facts of the case, it was sufficient to meet the ends of justice fully, and the additional sentence passed by the Joint Magistrate is unnecessarily too severe. The object of the petitioner and the peons whom he deputed was not to steal the dhan and the donga, but to put an unlawful pressure upon the complainant, to secure his attendance at the zemindary cutchery. For this offence a sentence of fine is fully adequate.

**MACLEAN, J.**

**MACLEAN, J.**—I think that there was a substantial compliance with the law in the order passed in the presence of the appellant's pleader that the case was to be heard on 28th March, and I accept the Magistrate's statement that he passed that order under section 279 of the Procedure Code.

But, with regard to the propriety of enhancing the sentence from one of fine to imprisonment and fine, I am of opinion, under the circumstances disclosed in the evidence, that the sentence of Rs. 25 fine, for what was only technically theft, was sufficiently severe.

As for the appellant's subsequent conduct in not surrendering to undergo the enhanced sentence, I do not allow that to weigh in considering the merits of the original case. No inquiry has been made into the circumstances under which he was not arrested.

I concur in setting aside the sentence of imprisonment in addition to the fine.

## [CRIMINAL APPELLATE JURISDICTION.]

DHUNNO KAZI AND ANOTHER . . . . . APPELLANTS;

. . . . . AND

EMPRESS . . . . . RESPONDENT.

1881  
Oct. 21st.No 530 of  
1881.*Charge to Fury—Misdirection—Inference from non-calling of witnesses by prosecution.*

It is the duty of the prosecution in a criminal case to produce all the evidence directly bearing on the charge. The only thing that can relieve the prosecution from calling witnesses, who, from their connection with the transactions in question, must be able to give important information, is the reasonable belief that, if called, they would not speak the truth. If they are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence is not necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

But no inference can properly, under corresponding circumstances, be drawn adverse to the accused.

**A**PPEAL from a conviction and sentence passed by the Sessions Judge of Hooghly.

Baboo *Umbika Churn Bose*, for the Appellants.

The facts sufficiently appear from the judgment of the High Court (1), which was as follows:—

We think there must be a new trial in this case.

The first accused person is charged with knowingly and dishonestly using as genuine a forged document. The second is charged with abetting that offence. The third is charged with using the document as evidence in a civil suit. In that suit, which was in respect of certain land, the plaintiff derived his title from the sister of the two accused by right of inheritance from their father. The document put in on behalf of the accused, and which forms the subject of the present

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charge, purported to be a conveyance of the property by the father in his lifetime to the accused.

The learned Judge appears to us, looking at his summing-up as a whole, to have left the right issues to the Jury, which were, briefly stated, whether the document was forged, whether it was used with knowledge of that fact, and whether this was done fraudulently or dishonestly.

But, in dealing with the evidence bearing upon these issues the learned Judge seems to us to have directed the Jury erroneously upon several material points.

The learned Judge says: "Then I must bring to your notice the proved circumstances that the accused's pleader in the civil suit adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence in the suit before he, the pleader, would undertake to put it in." Whether this conduct on the part of the pleader be usual or unusual, it is no evidence against the accused for the prosecution.

A more serious error is to be observed in the manner in which the learned Judge has dealt with the fact of the non-production of the survivors among those whose names appear as attesting witnesses to the document in question. The learned Judge points out first: "Of the ten, only three survive, of whom two have been cited to this Court by the defence, but have not been called by them, and the third has kept out of the way in rather a marked manner." He then, after stating quite correctly that the burden of proof is on the prosecution, proceeded: "But the prosecution may please itself without dictation from any one as to the exact amount of proof that they will put forward. If they do not put forward enough to satisfy a Jury, they have of course only themselves to blame, but they are not required to bring exhaustive proof of their case."

He then points out correctly, as it appears to us, that the weight to be attached to the non-production of material evidence by the prosecution must depend upon the circumstances of the case. And he proceeds: "Now this present is a very peculiar case. It is practically a sister prosecuting two brothers, and for the serious offence of forgery. You will at

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V.  
EMPERESS.  
Judgment.

once understand how difficult it is for the prosecution to depend upon the evidence of the purporting attesting witnesses who are still available. One of these has kept out of the way of both sides; the other two have been served for the defence, and one of these is in the employ of the accused, but these have not after all been called before you by the defence." And he adds: "You are entitled to presume from this mere fact that these witnesses, being cited for the defence as they were, would not, if called, have supported it." Later on he says: "The two attesting witnesses snatched from the prosecution, after it had been declared on the appeal in the previous trial by the accused that the prosecution ought to call them, might and should have been called," *i. e.*, by the defence.

The views expressed in the passages form the foundation for a considerable part of the learned Judge's summing-up. And they seem to us to convey erroneous notions of the position of prosecution and accused in a criminal case.

The only legitimate object of a prosecution is to secure, not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his power directly bearing upon the charge. It is *prima facie* his duty accordingly to call those witnesses who, from their connection with the transactions in question, must be able to give important information. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

There is no corresponding obligation upon the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the weakness of the case for the prosecution or to call witnesses, or to meet the charge in any other way he chooses. And no inference unfavourable to

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*Judgment.*

him can properly be drawn, because he takes one course rather than another. In the present case these considerations apply with peculiar force. If the witnesses referred to by the learned Judge are thought by the prosecution to be trustworthy men, the prosecution was bound to call them. If they are thought not to be so, it seems to us specially unreasonable to reproach the accused with not calling them.

On these grounds we think that the Jury have been misled in a manner that must have prejudiced the accused, and the case must be tried again.

As the case has already been twice tried, it seems to us to be better, and it will, we think, be more satisfactory to the learned Judge whose summing-up we have had to consider, that it should not be a third time tried at Hooghly. We, therefore, direct the new trial to take place at Burdwan.

The Magistrate of Hooghly will make arrangements for the attendance of the witnesses before the Sessions Court at Burdwan after learning from the Sessions Judge the date fixed for the trial.

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## [CRIMINAL REFERENCE.]

EMPRESS . . . . . APPELLANT ;

AND

KOLA LALANG AND ANOTHER . . . . . RESPONDENTS.

1881  
Dec. 14th.  
—  
No. 208 of  
1881.

*Excise Act, VII. (B. C.) of 1878, sections 15 and 61—Retail sale—Penal Statute,  
Construction of—Board of Revenue, Orders of, as to excise.*

Section 61 of Act VII. (B. C.) of 1878 must be construed strictly. Accordingly the words "the quantities specified in section 15" in that section must be taken to contemplate the quantities actually mentioned in section 15, and not such quantities, whether greater or smaller, as the Board of Revenue might, under any authority in it, specially fix upon.

*Quære.*—Whether the Board of Revenue has power specially to direct that any exciseable article may be sold in greater or less quantity by wholesale or retail than is specified in section 15 of Act VII. (B. C.) of 1878.

REFERENCE submitted for the opinion of the High Court by the Deputy Commissioner of Kamrup, Assam.

The reference was made under the following circumstances: Kola Lalang and Gelaug Lalaug were charged under section 61 of Act VII. (B. C.) of 1878, before the Extra Assistant Commissioner, with being in possession of a larger quantity of spirits than they were entitled to have under their licenses. Section 61 provides as follows: "Any person other than a licensed manufacturer or vendor, or a person duly authorized to supply licensed vendors, having in his possession any greater quantity of any exciseable article or any preparation or admixture of the same than the quantity specified in section 15, without a pass from the Collector or other officer duly empowered on that behalf, shall be liable to a fine not exceeding five hundred rupees."

It was alleged that the accused were in possession of

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a quantity greater than they were entitled to hold under their retail license. Section 15 provides that, unless the Board shall otherwise specially direct, the sale of any exciseable article in a greater quantity than is specified shall be a sale by wholesale, and the sale of any other quantity shall be deemed a retail sale, and the quantity of spirituous or fermented liquors specified is two imperial gallons or 12 quart bottles.

The Chief Commissioner had, however, passed an order that the maximum quantity of spirit that could be sold by retail was 6 quarts.

The Extra Assistant Commissioner was opinion that the "quantity specified in section 15" referred to in section 61 of Act VII. (B. C.) of 1878 must be taken to be 12 quarts, and he accordingly dismissed the charge.

The Deputy Commissioner was of opinion that section 61 must be taken to contemplate, not merely the quantities actually mentioned in section 15, but such quantities, whether larger or smaller, as the Board of Revenue might specially fix upon, and he accordingly referred the matter to the High Court under section 296 of the Code of Civil Procedure.

The following opinions on the reference were given by the High Court (1):—

FIELD, J.

FIELD, J.—The question in this case is concerned with the construction of sections 15 and 61 of the Bengal Excise Act, VII. of 1878. Two persons were charged, under section 61 of this Act with being in possession of a certain exciseable article, to wit, six quart bottles of native spirits, being a quantity in excess of the quantity specified in section 15. Now, section 15 is as follows: "Unless the Board shall otherwise specially direct, the sale of any exciseable article in a larger quantity than is specified below shall be deemed to be a sale by wholesale, and the sale of any other quantity shall be deemed a retail sale: spirituous or fermented liquors, two imperial gallons, or twelve quart bottles." The Chief Commissioner of Assam, exercising the powers of the Board of Revenue, made an order under the provisions of section 15

declaring that six quart bottles shall be the maximum amount; and the question is, whether any lesser quantity so declared to be the maximum quantity by the Board of Revenue under the powers conferred by section 15 of the Act can be taken to be "the quantity specified for each article in section 15" within the meaning of section 61. Now, it is a rule that a fiscal Statute must be construed strictly. The meaning of this rule is, that nothing is to be regarded as within the meaning of the Statute which is not within the letter, which is not clearly and intelligibly described in the very words of the Statute itself. It was said in the case of *Lord Huntingtower vs. Gardiner*, 1 Barn. and Cress. 299, that effect must not be given to a penal Statute unless the offence charged comes within the very words of it, and, in the case of *Rex vs. Bond*, 1 Barn. and Ald. 392, ABBOTT, J., said that it would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty, when the express words of the Act of Parliament do not authorize it. Again, WILLES, J., said, in the case of *Britt vs. Robinson*, L. R., 5 C. P. 513, that criminal enactments are not to be extended by construction, and that, "when an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal Statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question, and makes it criminal." Applying this rule of construction to the present case, we think it impossible to say that any lesser quantity of country spirits which may have been declared to be the maximum quantity by any rule or order made under the provisions of section 15 of the Act can be deemed to be "the quantity specified in section 15" within the meaning of section 61. A thing specified is a thing definitively mentioned or designated, and that can scarcely be said to be specified which depends on a rule or order to be made at some future time, and which may never come to the notice of the class of outside persons with which section 61 of the Act is concerned. For section 15 is applicable to licensed vendors who would naturally know of any alteration made by the Chief

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FJELD, J.



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 Judgment.  
 FIELD, J.

Commissioner as to quantity under that section; but section 61 applies to the general public who would have no special knowledge of any such alteration. (It may be possible that the intention of those who promoted the Act was different; but, if this were so, we can only say that adequate language has not been used to effectuate that intention.)

We think that the order of the Assistant Commissioner was correct, and we decline to interfere.

PONTIFEX, J. PONTIFEX, J.—I am of opinion that the order of the Assistant Commissioner is correct, and that we cannot interfere with it.

The charge was under section 61 of the Bengal Excise Act. The Assistant Commissioner held that the persons charged were not subject to a fine unless they were in possession of a larger quantity of native spirits than that actually specified in section 15 of the Act.

Section 15 enacts as follows: "Unless the Board shall otherwise specially direct, the sale of any exciseable article in a larger quantity than is specified below shall be deemed to be a sale by wholesale: spirituous or fermented liquors two imperial gallons or twelve quart bottles."

This section applies only to the sale of liquor by licensed manufacturers and vendors.

The language by which legislative authority is deputed to the Board to vary the quantity is peculiar; and, as at present advised, it seems to me questionable whether the legislative authority so deputed empowers the Board (or in this case the Chief Commissioner) to lessen the quantity which is to constitute a wholesale sale even with respect to the licensed manufacturers and vendors mentioned in the section.

And, apart from the peculiar language by which the legislative authority is deputed, it would seem on general grounds questionable. For though the Legislature might reasonably depute its authority for the purpose of relaxing the penal obligations of its own Act, it is scarcely reasonable to suppose that it would, even if it could, depute its authority to render its Act more stringent to impose severe restraints, without debate, and after having itself carefully considered and specified what quantity should be deemed to constitute a wholesale sale.

But, however this may be, I can find no authority deputed to vary the quantity so as to affect the general public under sections 17 and 61, and to render them liable to a penalty for possessing a smaller quantity than that actually specified by the Legislature in section 15.

. According to the well-known rule, a Statute imposing penalties must be construed strictly, and the Assistant Commissioner was therefore, in my opinion, right in refusing to impose a fine in the present case. . .

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v.  
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LALANG.  
*Judgment.*

## [CRIMINAL APPELLATE JURISDICTION.]

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Dec. 21st.  
—  
No. 740 of  
1879.

FEDA HOSSEIN . . . . . APPELLANT;  
  
AND  
  
EMPRESS . . . . . RESPONDENT.

*Penal Code (Act XLV. of 1860), section 463—Forgery—Intention to injure.*

To constitute the offence of forgery as defined by section 463 of the Indian Penal Code, it is not sufficient to prove that, in making the document in respect of which the offence is charged, the accused knew that the document might injure, but it must be proved that it was his intention that it should injure, another.

APPEAL from a conviction and sentence passed by the Sessions Judge of Bhaugulpore.

The facts sufficiently appear from the judgment of the High Court (1), which was delivered by

TOTTEN-  
HAM, J.

TOTTENHAM, J.—The Sessions Judge, differing from the Assessors, has convicted the appellant of the forgery of the letter

(1) McDONELL and TOTTENHAM, JJ.

marked A, which was sent to the Inspector-General of Jails, and purported to come from one Zahim Singh, a jail-warder, as an application for transfer. The cover had been stamped with a "service" postage stamp, which fact led the Inspector-General to direct the Superintendent of the Monghyr Jail to inquire how the writer of the letter came to use such a stamp. Zahim repudiated all knowledge of the letter; and, even if it was really his, the inquiry about the use of the service stamp might well induce him to deny all connection with it. This circumstance was certainly deserving of some weight in considering the value of his denial, but the Sessions Judge does not allude to it in his judgment. The writing of the letter was traced to the prisoner, who was a copyist in the Collector's office; and he admitted having written it, but alleged that he had so done at the request of Zahim Singh himself. He was unable to prove this, and there was evidence, which satisfied the Judge and also the Assessors, that it was extremely improbable that Zahim Singh authorized any such letter to be written. Be this as it may, I am of opinion that the Assessors were right in holding that the offence of forgery was not proved against the prisoner, because the essence of that offence, *viz.*, the intention to cause damage or injury, or to commit fraud, was not proved. It seems to me that there is nothing in the evidence which legally warrants the finding that the prisoner had any such intention in writing the letter. It is incumbent upon the prosecution to prove all the elements of the offence charged; and, in the absence of proof of any one essential element, a conviction cannot be maintained. It is not enough to prove that the prisoner's allegation, that Zahim himself authorized the writing of the letter, was false. It seems to me that this allegation, though not true in fact, may have been believed to be true by the prisoner when he first made it; and, having made it, he may have been afraid to change his story afterwards. My reason for this view is this: that Zahim Singh deposes that he had no knowledge whatever of the prisoner previously. Therefore it may be presumed in the prisoner's favour that he too did not know Zahim; at any rate, there is no sort of proof attempted that the prisoner had any ill-will against him, or any motive

[CRIMINAL.]

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HAM, J.

whatever for wishing to injure him. The only reasonable theory seems to me to be, that some other person, possessed of such desire, made use of the prisoner, and such person, not necessarily wishing to confide his criminal intention to the prisoner, would not improbably represent that he was himself Zahim Singh, or some friend acting for him. Thus, the prisoner might *bonâ fide* have believed that, in writing the letter, he was complying with a request of Zahim Singh, who was not personally known to him.

The Sessions Judge has convicted the prisoner, because he holds that, whether he wrote it of his own accord, or at the suggestion of another, he equally well knew that it might prove damaging or injurious to Zanim. But this assumes what the evidence for the prosecution in fact disproves, *viz*, that the prisoner was acquainted with Zahim, and was aware of the circumstances which rendered it improbable that he would wish such a letter to be written; or else it assumes that some enemy of Zahim had informed the prisoner of his wish to injure that person.

And it would not be enough to prove that the prisoner knew that the letter might be injurious or damaging to Zahim. To constitute the offence of forgery as defined in section 463, it must be proved that such was his intention. I think, therefore, that the conviction is bad in law, and that it must be set aside.

The prisoner will be released.

## [CRIMINAL APPELLATE JURISDICTION.]

THEWA RAM AND ANOTHER . . . . . APPELLANTS;  
 . . . . . AND  
 EMPRESS . . . . . RESPONDENT.

1882  
 Jan. 5th.

No. 717 of  
 1881.

*Penal Code (Act XLV. of 1860), sections 193 and 403—Criminal misappropriation—Fabricating false evidence.*

A person, having made a hole in the wall of his own house, broke open a box, and removed the contents, to which he believed himself entitled, but as to which there was a dispute, making the removal appear to have been the act of thieves from the outside, and entrusting the property to another person. He was charged with criminal misappropriation under section 403, and with fabricating false evidence for purpose of its being used in a stage of a judicial proceeding under section 193 of the Penal Code. It did not appear that any charge had been laid by the accused against any one in respect of the removal of the contents of the box.

*Held* that the circumstances did not warrant the charges under either section of the Penal Code.

**A**PPEAL from a conviction and sentence of the Sessions Judge of Shahabad.

The facts of the case sufficiently appear from the following judgment of the High Court (1), which was delivered by

MORRIS, J.—In this case the principal accused, Mewa Ram, MORRIS, J. has been convicted by the Sessions Judge of Shahabad of offences under sections 403 and 193 of the Indian Penal Code, and sentenced to four years' rigorous imprisonment. The second accused, Ram Lochun, has been convicted under section 411, and sentenced to three years' rigorous imprisonment.

Even admitting that the facts, as found and represented by the Sessions Judge, are correct, we are unable to understand how the accused, Mewa Ram, has committed any offence of criminal misappropriation of property. What he appears to have done is to have removed, under the false assumption (of appearances

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 —  
*Judgment.*  
 —  
 MORRIS, J.

to correspond of a burglary by strangers), certain articles which were in a box in his own house, and which articles had belonged to his uncle, one Sheoborut, deceased, of whom he is the next heir. From the evidence of the chief witness, Thakur Ram, it is clear that, between him, as the husband of the granddaughter of Sheoborut, and Mewa Ram, there is a dispute regarding the property of the deceased. He states that, shortly after the death of Sheoborut, the Deputy Magistrate came and placed certain jewels of the deceased in a box, giving the key of the box to him, Thakur Ram, and the key of the room in which the box was placed to Mewa Ram. There is no evidence to show that the Deputy Magistrate had any authority to act in this manner, and it was only apparently on Thakur Ram applying to the District Judge to attach the property that Mewa Ram took the steps already mentioned to remove the contents of the box, making the removal to appear as the act of thieves from outside.

It seems to us to be clear that the Deputy Magistrate, if he acted in the manner stated by the witness Thakur Ram, exceeded his powers. As unclaimed property, he might have interfered with it, but it is evident that both Mewa Ram and Thakur Ram on the part of his wife laid claim to it. Thakur Ram admits that, three months prior to this occurrence, Mewa Ram had been dealing with other property of the deceased Sheoborut as his own, and that, in consequence of this, he, Thakur Ram, and his wife had been compelled to leave the family-house, and to make an application, presumably under Act XIX. of 1841, to the District Judge. If, therefore, the prisoner, Mewa Ram, for the purpose of defeating this application, or for any other reason, made an opening in the wall of his own house, broke open the box which contained the jewels, and carried them off, and entrusted them to the other accused, Ram Lochun, it cannot be said that he committed any offence, or that he did this otherwise than in good faith in the belief at the time that he was dealing with his own property. His case is, in many respects, similar to that given in the first portion of Illustration (a) appended to section 403, Indian Penal Code. This prisoner cannot, therefore, be convicted of the offence of dishonestly mis-

appropriating to his own use moveable property under section 403.

Then, as to the offence charged as committed by him under section 193, the Sessions Judge fails entirely to show upon what evidence this charge is supported. Mewa Ram did not, so far as appears from the record, lodge any information at the thannah, or charge any person or persons with the commission of a burglary in his house. We fail to see in what manner he fabricated false evidence for the purpose of being used in a stage of a judicial proceeding.

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Judgment.  
MORRIS, J.

We therefore set aside the conviction and sentence passed upon him under both counts, and direct that he be discharged.

The conviction and sentence passed upon the other accused, Ram Lochun, must also be set aside. Whatever this accused did in connection with the property, he did in concert with, or at the instance of, the principal accused, Mewa Ram, its ostensible owner; and therefore in no sense can he be said to have dishonestly received stolen property having reason to believe the same to be stolen property. We therefore direct that he, too, be discharged.



## [CRIMINAL JURISDICTION.]

1881  
Sept. 15th.  
—  
No. 27 of  
1881.

EMPRESS ON THE PROSECUTION OF THE BANK OF BENGAL  
AND  
DINONATH ROY.

*Presidency Magistrates Act (IV. of 1877), section 170—Depositions, Right to copies of—Specific Relief Act (I. of 1877), section 45.*

All prosecutors whose charges are dismissed by a Presidency Magistrate are affected by the orders dismissing them, and are entitled, under section 170 of the Presidency Magistrates Act, to copies of the order and depositions; and, where a charge of cheating brought by the Bank of Bengal was dismissed by a Magistrate, the High Court, under section 45 of the Specific Relief Act, directed that copies of the orders and depositions which had been refused by the Magistrate should be made over to the attorney for the Bank.

**R**ULE under section 45 of the Specific Relief Act and section 170 of the Presidency Magistrates Act calling upon the Chief Presidency Magistrate to show cause why he should not give to the Bank of Bengal copies of the depositions and of the orders made in a case in which one Dinonath Roy had been charged by the Bank with cheating. Dinonath Roy had been discharged, and, on an application being made to the Chief Magistrate for copies of the orders made by him, and of the depositions taken in the case, he refused to allow such copies to be given.

*Paul* (Advocate-General), in support of the Rule.

*Bonnerjee* (Officiating Standing Counsel) showed cause.

The following order was made by the High Court (1):—

The Chief Presidency Magistrate has been called upon to show cause why he should not give to the Bank of Bengal copies of the depositions of witnesses and the orders recorded in the matter of their complaint made against Dinonath Roy, who has been discharged by the Magistrate.

This Rule is moved under the Specific Relief Act, and under section 170 of the Presidency Magistrates Act.

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 ROY.  
 Statement.

Two questions arise in this matter—*first*, whether, under section 170 of the Presidency Magistrates Act, the Bank of Bengal, as the prosecutors in the case, have a right to these copies; *second*, whether, supposing that they have a right, and this right has not been acceded to by the Magistrate, the High Court can proceed under section 45 and the following sections of the Specific Relief Act to order the Magistrate to fulfil this duty?

Although the rule has been moved for under the Specific Relief Act, it appears to us to be beyond doubt that the provisions of section 15 of the High Court Charter Act enable the Court to make the order upon the Magistrate if it ought to have been made. But we think that section 45 of the Specific Relief Act is wide enough in its terms to apply to a case like this. Section 7 of the Specific Relief Act has been referred to as showing that "specific relief cannot be granted for the mere purpose of enforcing a penal law." It cannot be said, however, that an application to the Magistrate to grant copies of depositions and order is an application "for the mere purpose of enforcing a penal law." Copies may be required for many purposes.

Then the application must "be made by some person whose property or franchise, or personal right, would be injured by the forbearing or doing (as the case may be) of the said specific act." If the prosecutor has a right to the copies, his personal right would be injured if they were refused. And it does not appear that the applicant has any other specific and adequate legal remedy.

Then the question is, whether, under section 170 of the Presidency Magistrates Act, the applicant is entitled to copies of the depositions and order. Section 170 enacts that, "If any person affected by an order passed under this Act desires to have a copy of such order, or of any deposition or other part of the record, he shall, on applying for such copy, be furnished therewith: provided that he pay for the same unless the Magistrate, for some special reason, thinks fit to furnish it free of cost." It is contended that this does not apply to a prosecutor, because the Crown is the prosecutor, and not the private individual. There is no doubt that, technically,

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Statement.

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the Crown is the prosecutor. But, supposing we were to say that, on that ground, the private individual cannot apply for copies of depositions, the consequence may be very serious. It is said it would be very inconvenient if the Magistrate were to be called upon to furnish those copies in every case. However great the inconvenience may be, it would be a much more serious thing if he were justified in refusing an application for copies. As far as the inconvenience goes, it has not been shown that it would be very great in any case, as the section provides that copies are to be furnished on payment of costs for the same unless the Magistrate specially directs copies to be furnished without payment. But, supposing the prosecutor, having failed in his prosecution, is not allowed to get copies of the depositions, the consequences may be most serious to him. Take, for instance, the case in which a prosecutor charges the accused with defamation, or with bringing some charge against him which seriously affects his character, and suppose, for some reason which left the character of the prosecutor perfectly clear and untainted, the accused person were to be discharged, then, if the prosecutor were unable, under this section, to get copies of the depositions, it might be said that he had prosecuted a man for charging him with an infamous crime, and yet that the accused had been acquitted, and people would conclude that the prosecutor had been guilty of the crime imputed to him. We think this single instance would show that the consequences of refusing copies would be most serious. No distinction can be made between such a case as this and any other case: the section is perfectly general. A prosecutor who charges another with dishonesty as in this case, if he cannot sustain the charge, might suffer an unjust imputation unless, by producing a true record of the proceedings, he could show that his action was *bonâ fide*. No distinction ought to be made between the prosecutor in one case and in another. All prosecutors whose charges are dismissed by the Magistrate are, in our opinion, affected by the orders dismissing them, and are entitled, under section 170, to copies of the order and depositions. The Rule will be made absolute.

We direct that the copies be given to Mr. Macnair, Attorney of the prosecutors,

## [CRIMINAL REFERENCE.]

EMPRESS . . . . . APPELLANT;

AND

BHOIRUB CHUNDER DATTA . . . . . RESPONDENT.

1881  
Oct 27th.No. 201 of  
1881.

*Criminal Procedure Code (Act X. of 1872), sections 521 and 526—Fury—  
Disobedience to order of Court—Penal Code (Act XLV. of 1860), section  
188.*

A jury having been applied for and duly appointed under section 521 of Act X. of 1872, one of the jurors appointed by the Magistrate fell sick, and the foreman of the jury, unknown to the Court, substituted another man in his place. The Magistrate accepted the report of the majority of the jury so constituted, and made an order under section 526. This order having been disobeyed, proceedings were taken under section 188 of the Penal Code against the person to whom it was directed, and he was convicted and sentenced to imprisonment.

*Held* that the report upon which action was taken not being the report of a regularly constituted jury, the order and the conviction and sentence passed on disobedience thereto were illegal.

REFERENCE submitted by the Magistrate of Burdwan under section 296 of the Code of Criminal Procedure on the 20th October 1881.

The facts of the case are as follow: In January 1881, a petition was presented to the Magistrate, complaining that one Bhoirub Chunder Datta had obstructed a certain road by throwing bricks, earth, etc., thereon. An order was passed directing the police to report. The police reported that the obstruction existed. Upon this report, an order was passed directing Bhoirub Chunder Datta to remove the obstruction within ten days, or to show cause. Bhoirub Chunder Datta presented a petition on the 1st March alleging that the road was not a public one, and praying for a jury. The Magistrate, on this, nominated three jurors, the

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 DATTA.  
 —  
*Statement.*

foreman being the Sub-Inspector of Police; and Bhoirub Chunder nominated two. The papers were sent to the jury. The Sub-Inspector, finding that one of the jurors nominated by the Magistrate was ill, substituted another, but did not report that he had done so. On the 25th April, the jury furnished their report. Three jurors, *i. e.*, the two nominated by the Magistrate and one appointed by the Sub-Inspector, held that Bhoirub Chunder had obstructed the road, but did not submit any direct finding as to whether the Magistrate's order was a proper one. The other two jurors, in a separate report, found that Bhoirub Chunder's earth had encroached 2½ haths on the south of the road, but came to no finding as to the road being a public one or the Magistrate's order being proper. Upon receipt of these reports, Bhoirub Chunder was directed to remove the obstructions within ten days on pain of being prosecuted under section 188 of the Penal Code. The Police reported in due course that Bhoirub Chunder had not carried out the order. He, of his own motion, appeared and stated that he had carried it out. A further inquiry on the point was ordered, and it was reported that the order was only partially carried out. A fresh notice was served on Bhoirub, and he then presented a petition stating that the land did not belong to him. The Magistrate's order was, that the Police should state specifically whether the earth, etc., had been removed or not. The Police reported that it had not been done, but that the land (or most of it) was then in possession of a choukidar. Upon this, Mr. Phillips, Joint Magistrate, who was in temporary charge of the Head-Quarters Sub-Division during the absence of the Magistrate, directed that Bhoirub Chunder Datta should be prosecuted under section 188 of the Penal Code, and fixed the 20th September for hearing the case. On that date, he, being no longer in charge, and without any fresh order from the Magistrate, commenced to try the case, and finally sentenced Bhoirub to one month's simple imprisonment. Bhoirub then referred the matter to the Magistrate under section 256, Criminal Procedure Code, contending—

*1st*—that, sending the matter for the decision of a jury, the Magistrate should have determined, under section 532 of the

Criminal Procedure Code, whether the road was a public one or not (*vide In re Chundernath Sen*, I. L. R., 5 Cal. 875)—more especially as that question was directly raised;

2nd—that the finding of the jury was null and void, because one of the majority was not nominated by the Magistrate, and there was no direct finding by a majority as to the propriety of the Magistrate's order;

3rd—that the case was not made over to Mr. Phillips for trial, and that, therefore, he had no jurisdiction;

4th—that Mr. Phillips having instituted the proceedings under section 188 of the Penal Code, section 471 of the Criminal Procedure Code applied, and that he could not try the case himself;

5th—that, under the circumstances, the sentence was too severe.

The Magistrate referred the matter to the High Court that the order might be set aside.

The following judgment of the High Court (1) upon the Reference was delivered by

PRINSEP, J.—The petitioner in this case has been convicted under section 188 of the Penal Code, and sentenced to one month's simple imprisonment by the Joint Magistrate of Burdwan for disobeying an order passed under section 526 of the Code of Criminal Procedure.

On being served with an order under section 521, petitioner applied for a jury, which was duly appointed. One of the persons appointed by the Magistrate fell sick, and his place was filled by the Sub-Inspector of Police, the foreman of the jury. Separate reports were submitted by the nominees of the petitioner on the one hand, and by the majority which comprised the new juror appointed in the manner stated. The Magistrate accepted the report of the majority, and proceeded under section 526.

It appears that the petitioner neglected to carry out the Magistrate's orders to the full extent until after the prosecution was instituted, and the result of the trial has been that he has been sentenced to the maximum term of imprisonment allowed by law.

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DATTA.

*Judgment.*

PRINSEP, J.

The mere fact that the report on, which action was taken was not the report of a regularly-constituted jury is, in itself, sufficient ground to invalidate the order and the conviction and sentence passed on disobedience thereof. Because the law (section 526, para. 4), in certain specified cases, allows a Magistrate to proceed irrespective of the report of a jury, that is certainly no valid reason for maintaining the present order, which was passed expressly on the report of the majority of the irregularly-constituted jury.

We regret to observe the harsh manner in which the Joint Magistrate has dealt with the petitioner. Inexcusable delay in carrying out a lawful order, no doubt, renders a person liable to punishment for his neglect; but, when he has, during the course of the proceedings, endeavoured to correct his remissness, and very slight injury or inconvenience has resulted, it certainly is a grave error of judgment to sentence him to the extreme sentence of imprisonment allowed by law.

We also strongly deprecate the improper terms in which the Joint Magistrate has expressed himself regarding the District Magistrate to whom he is subordinate. In some respects, the District Magistrate may not have been strictly correct in expressing the law, but, no doubt, on receiving the Joint Magistrate's explanation, and on re-consideration of his previous remarks, the District Magistrate would have amended them. Nothing could justify the terms in which the Joint Magistrate has written.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF TEACOTTA SHEKDUR }... APPELLANTS ;  
 AND OTHERS . . . . . }

1882  
 Feb. 28th.

•  
 AND

No 38 of  
 1882.

AMEER MAJEE AND OTHERS. . . . . RESPONDENTS.

*Criminal Procedure Code (Act X. of 1872), section 48—Transfer  
 of case—General transfer.*

An order under section 48 of the Criminal Procedure Code ought not to be passed without notice to the parties.

*Quere.*—Whether a general order passed by the District Magistrate directing that cases occurring in a particular locality should be transferred and heard by the Magistrate of another sub-division, is warranted by section 48 of the Criminal Procedure Code.

**M**OTION to set aside an order passed by the District Magistrate of Moorshedabad.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows :—



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 In re  
 TEACOTTA  
 SHEKDUR  
 v.  
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 MAJEE.  
 Judgment.

The petitioners state that a criminal case, in which the petitioners were complainants, and Ameer Majee and others were defendants, was pending in the Deputy Magistrate's Court of Jungipore. This case was transferred to the Sub-Divisional Officer of Lallbagh by an order of the Officiating Magistrate of the District, purporting to have been passed under section 48 of the Criminal Procedure Code. The petitioners have applied to this Court to set aside the order of transfer on the grounds (1) that it is not warranted by section 48; (2) that it should not have been passed without any notice to them, they being entitled to be heard in the matter; and (3) that it would be extremely inconvenient to them to attend the Court at Lallbagh, which is at some distance from their home.

By the order of the Officiating Magistrate referred to above, he directed that "all criminal cases occurring in Chuckla Ramchundrapur, and all cases, if there be any, or any should arise, occurring near these, and connected with the disputes there going on," be withdrawn from the jurisdiction of the Sub-Divisional Officer of Jungipore, and be tried by the Sub-Divisional Officer of Lallbagh.

It is doubtful whether the Officiating Magistrate's order is warranted by section 48; but, even supposing that he had the power of transferring the case at the stage in which it was under this section, he is clearly in error in exercising this power without giving the plaintiffs any notice, or giving them any opportunity to be heard in the matter. (See Criminal Motion No. 302 of 1877, *Faffer Ali and others*, petitioners, 26th February 1877; also *Omrao Singh vs. Fakir Chand*, I. L. R., 3 All. 749.) The order of the Officiating Magistrate transferring this case is therefore quashed, and the Sub-Divisional Officer of Jungipore will now proceed to dispose of it in accordance with the law.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF KALEE MUNDLE AND. } ... PETITIONERS.  
 OTHERS . . . . . }

1882  
 Feb 31st.

*Penal Code (Act XLV. of 1860), section 148—Ryot—Private defence.*

No. 28 of  
 1882

A disturbance having been created with reference to the possession of certain chur land, the Sessions Judge, on appeal, found that certain persons had unlawfully trespassed thereupon, and that the accused had been justified in resisting the trespass by force. Inasmuch however, as he considered the accused had exceeded their right of private defence of their property, he convicted them of rioting under section 148 of the Penal Code.

*Held* that, on the findings of the Judge, the conviction could not be supported, inasmuch as, on such findings, the persons convicted were not members of an unlawful assembly.

**M**OTION to set aside a conviction and sentence passed by the Sessions Judge of Moirshedabad.

The facts are set out in the judgment of the High Court (1) which was as follows :—

The petitioners, Kalee Mundle, Ram Lall, Judhisteer, and Sreemanta and six other persons, all ryots of the village of Paresnauthpore, were charged in this case with rioting armed with deadly weapons. They were convicted by the Magistrate, and each sentenced to one year's rigorous imprisonment. There was a charge against the petitioner, Kalee Mundle, under section 325 of the Indian Penal Code, of which charge he was acquitted by the Magistrate.

The charge originated in a complaint made by some of the servants of the zemindar of the village. The evidence adduced on behalf of the prosecution is, that these servants, including two persons named Obhoy and Farun, came to inspect some newly-formed land in order to ascertain whether it had become fit for indigo cultivation. Thereupon the ryots collected in a body, attacked, and assaulted them. They fractured the nose

1882

In re

KALEE  
MUNDLE.

Judgment.

of Obhoy, and captured him and Farun, the others having escaped by running off. They afterwards kept these two men in illegal confinement for some hours, and then took them to the thannah, and preferred there a complaint of rioting against them and the other servants of the zemindar.

The case for the defence was, that the zemindar's servants came to the village with a number of lattials in order by force to sow indigo on the new chur land, which the ryots claimed as theirs. But, finding the ryots were prepared to resist their attempt to sow indigo on their cultivation, they ran off. But Obhoy and Farun falling behind were arrested and made over to the chowkeedar of the village, who took them to the thannah.

The Magistrate, accepting the story told by the witnesses for the prosecution as true, convicted the accused persons.

On appeal the Sessions Judge finds (1) that, before this disturbance, the chur land was in the possession of the ryots; (2) that the zemindar's party, coming with the intention of sowing indigo forcibly upon it, unlawfully trespassed into it; and (3) that the ryots were justified in resisting the trespass by force. But he thinks that the ryots exceeded their right of private defence of their property in fracturing the nose of Obhoy, and in confining him and Farun, and then carrying them off to the thannah.

Upon these findings, the Judge acquitted all the accused persons excepting Kalee Mundle, who, in his opinion, fractured the nose of Obhoy, and the other three petitioners who, he finds, kept Obhoy and Farun in confinement. He convicted these persons of rioting under section 148 of the Indian Penal Code, and sentenced them each to six months' rigorous imprisonment.

It appears to me that the conviction under section 148 of the Indian Penal Code cannot be sustained in the face of the Judge's finding that the ryots were justified in resisting the criminal trespass of the zemindar's people by force. To support a conviction under section 148 of the Indian Penal Code, it is necessary to find that the convicted persons were members of an unlawful assembly. According to the Judge's finding, the common object of the assembly of ryots was to resist by force

the unlawful action of the zemindar's people. He also finds that they were justified in using force to a reasonable extent, and upon that ground acquits many of them.

When individual members of that assembly exceeded their right of private defence, did it become an unlawful assembly within its definition in section 141 of the Indian Penal Code? Such a conclusion could be supported if the Judge had found, under section 142 of the Indian Penal Code, that all or some of the ryots having become aware that the right of private defence had been exceeded by some members of the assembly continued in it. I do not find upon the Judge's judgment that that was the case. The conviction of the offence of rioting, therefore, cannot stand. Neither could Kalee Mundle be convicted of the offence of grievous hurt, because he was acquitted by the Magistrate of that charge, and there was no appeal against the order of acquittal. As to illegal confinement, there was no such charge against any one of the petitioners, who must therefore be all acquitted altogether and released.

1882

*In re*  
KALEE  
MUNDLE.

*Judgment.*  
—

## [CRIMINAL REFERENCE.]

## IN THE MATTER OF SHASTI NAPIT.

1882  
Feb. 24th.  
—  
No. 306 of  
1882.

*Penal Code (Act XLV. of 1860), sections 224 and 225A—Custody for an offence.*

A person, who was arrested under section 94 of the Criminal Procedure Code in order that he might be taken before a Magistrate and bound over to be of good behaviour, escaped from custody before he could be produced before the Magistrate.

*Held* that, assuming he had been legally arrested, he could not be considered to be "lawfully detained in custody for any offence," and was, therefore, not liable to punishment under section 224 of the Indian Penal Code; and further that, inasmuch as he had not failed to furnish security for good behaviour, he was not liable to punishment under section 225A of the same Code.

REFERENCE submitted by the Officiating Judge of Moorshedabad. The terms of the reference were as follow:—

The prisoner, Shasti Napit, had been arrested for transmission to the Magistrate in order that he might be bound over, under section 505 of the Code of Criminal Procedure, to be of good behaviour. But, before he was produced before the Magistrate, he escaped from custody.

Mr. Beames afterwards tried and sentenced him for this escape to six months' rigorous imprisonment under section 224 of the Indian Penal Code.

Section 224 does not, I think, apply, as the man was not in custody for an 'offence.'

Section 225A would not apply, as the custody was only preliminary to asking for an order to furnish security.

It seems to me, therefore, that the conviction was wrong, and should be quashed.

The judgment of the High Court (1) was as follows:—

The conviction seems to be illegal. Assuming that Shasti Napit was legally arrested under section 94, Criminal Procedure

Code, he was not "lawfully detained in custody for any offence," and could not, therefore, be punished under section 224, Indian Penal Code. Nor could he have been punished under section 225A, as he had not failed to furnish security for good behaviour.

1882  
In re  
SHASTI  
NAPIT.  
Judgment.

The conviction must be set aside, and the warrant for his imprisonment cancelled.

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## [CRIMINAL JURISDICTION.]

1882  
Mar. 2nd.  
—  
No. 33 of  
1882.

IN THE MATTER OF KASSIM BISWAS AND } ... PETITIONERS.  
TWENTY-FIVE OTHERS . . . . . }

*Criminal Procedure Code (Act X. of 1872), sections 491 and 500.*

Where a Magistrate bound down 26 persons to keep the peace under section 491 of the Criminal Procedure Code after recording evidence as to 11 of them only, the order was set aside as to the persons not affected by the evidence.

**M**OTION to set aside an order of the Deputy Magistrate of Moorshedabad, requiring the petitioners to give recognizances to keep the peace under section 491 of the Criminal Procedure Code.

In this case it appeared that there was a dispute as to the possession of certain lands of mouzah Chukla Ram Chunderpore, and that the Deputy Magistrate thereupon instituted proceedings under section 530 of the Criminal Procedure Code, between the petitioners and certain parties, set up by the manager and assistant of the firm of Messrs. Jardine, Skinner, and Co.

While the proceedings were still pending, the Deputy Magistrate, on the 5th November 1881, passed an order under section 518 of the Criminal Procedure Code, prohibiting the petitioners from reaping their crops. On the same date he also summoned the petitioners to show cause why recognizances should not be taken from them under section 491 of the Criminal Procedure Code, and, on hearing the case on the 5th December 1881, bound them down under recognizances for Rs. 100 each to keep the peace for one year.

It was now submitted that the order was improper, and should be set aside for (among others) the following reasons:—

(1) That the evidence did not relate to all the petitioners, and, therefore, they could not all be bound down to keep the peace. (2) That the evidence did not show that the

petitioners were at all likely to commit a breach of the peace.

(3) That, under the circumstances of the case, there was no necessity for the order complained of.

Mr. *H. E. Mendies*, for Petitioners.

The judgment of the High Court (1), which was as follows, was delivered by

TOTTENHAM, J.—In this case the Deputy Magistrate has bound over, to keep the peace under section 491 of the Code of Criminal Procedure, 26 persons. He admits in his order that the evidence recorded by him effects only some of these persons, and, in fact, it appears from the record that only 11 are named. His order, as against these 11 persons, is legal, and, as against all the rest, it is illegal.

The order of the Deputy Magistrate must, therefore, be set aside as regards all the persons bound over, excepting these 11, namely, Goolzar, Abdool Hakeem, Enaetulla, Kassim Biswas, Abbasi, Kangali, Elahi, Assaluth, Zumiruddin, Deedum, and Batasee Goolzar.

The Vakeel for the petitioners asks us to set aside the order, as against all on the ground that it is no longer necessary to keep them bound under recognizances, there being an attachment in force in respect of the land with regard to which the dispute took place.

This is, however, not a matter with which we can deal. The Magistrate of the District can deal with it under section 500 should he think fit to do so.

(1) CUNNINGHAM and TOTTENHAM, JJ.

1882

*In re*  
KASSIM  
BISWAS.

*Judgment.*

TOTTEN-  
HAM, J.



## [CRIMINAL JURISDICTION.]

1881  
Dec. 4th.  
—  
No. 218 of  
1881.

EMPRESS . . . . . APPELLANT;  
AND  
SODDANUND MAHANTY . . . . . RESPONDENT.

*Stamp Act (I. of 1879), sections 37, 40—Evasion of stamp-duty—Intention—Procedure—Interpretation of fiscal Statutes.*

Six persons, the members of a punchayet, as arbitrators, decided a dispute between two of their fellow-villagers, as to a piece of land, and delivered their judgment or award in writing. Subsequently the award was filed by one of the parties thereto in the Moonsiff's Court, and, not being stamped, was impounded by the Moonsiff, who forwarded it to the Collector. That officer directed that the writer of the document should be prosecuted, and accordingly the six persons, who acted as arbitrators, were summoned by the Deputy Magistrate, to whom the case was entrusted, and by him fined Rs. 25 each.

*Held* that the conviction was illegal, inasmuch as the procedure laid down by the Stamp Act, I. of 1879, had not been, as it ought to have been, strictly followed.

REFERENCE submitted by the District Magistrate of Cuttack, under section 297 of the Civil Procedure Code, Act X. of 1872, in the matter of the conviction of certain persons under section 61 of Act I. of 1879.

The circumstances are stated in the Reference, which was in the following terms :—

The Moonsiff of Cuttack impounded a document (marked Exhibit A by the Deputy Magistrate) purporting to be an award on plain paper of a punchayet determining a dispute regarding 1 m. 1 g. 2 b. of land. The Moonsiff considered that the proper stamp for such a deed was Rs. 5. This sum, with the penalty imposed by him of Rs. 50, was out of the power of the litigant who presented the document to pay, and it was impounded. But the Moonsiff should have seen (as pointed out by the Deputy Magistrate in a reference to the stamp law) that the stamp should have been of 4 annas value, for, I presume, the Moonsiff knows

the selling price of a mun of cultivating land, or of a cultivator's rights therein (*see* Schedule I., art. 10). The sum of 4 annas, together with the minimum penalty of Rs. 5, would probably have been paid by the litigant if demanded.

But the penalty demanded not having been paid, the document was sent to the then Collector, who ordered a criminal prosecution. The Deputy Magistrate, to whom the case was referred, summoned the six members of the punchayet who had made the award, and imposed the penalty above mentioned.

I beg to submit that the penalty is excessive. Six respectable villagers, who performed an honorary office to settle a dispute, have been dragged into Court and plundered of a sum amounting to 600 times the deficit stamp, on the pretence of securing the Government from frauds on the stamp-revenue in a case in which it is patent that no fraud was ever dreamt of. The litigant, who utilized the services of these villagers, was called on wrongly to pay, and was the innocent cause of their wrongs.

The judgment of the High Court (1), which was as follows, was delivered by

FIELD, J.—In this case six persons have been convicted under section 61 of the Indian Stamp Act, I. of 1879, under the following circumstances: These six persons were members of a punchayet who decided a matter relating to a small piece of land, acting as arbitrators or umpires between two of their fellow-villagers. This decision or arbitration was reduced into writing, but the writing was not stamped. One of the persons, at whose instance it was made, having subsequently resorted to the Civil Court, this written award was filed in the suit. This paper may possibly have been an award written within the meaning of Art. 10, Schedule I. of the Stamp Act; and, as it had not been stamped, the Moonsiff, before whom it was filed, proceeded to impound it; and subsequently, in accordance with the provisions of section 35 of the Stamp Act, he forwarded the paper to the Collector. The Collector, upon this, made an order that the writer of the document be sent to the Deputy Magistrate for trial under the Criminal Code. The Deputy Magistrate, upon this, summoned the six persons, who had acted as arbitrators, and imposed upon them a fine of Rs. 25 each, making a total of Rs. 150.

1881

EMPRESS  
v.  
SODDANUND  
MAHANTY.  
—  
*Judgment.*

FIELD, J.

1881

EMPRESS  
v.  
SODDANUND  
MAHANTY.  
*Judgment.*  
FIELD, J.

It appears to us that this conviction is illegal, and must be set aside. When the Moonsiff forwarded the award to the Collector under the provisions of section 35 of the Stamp Act, the course which the Collector ought to have pursued was that laid down by section 37 of the Act, the language of which section is imperative—"He shall adopt the following procedure." If the Collector was of opinion that the instrument was chargeable with duty, and was not duly stamped, his course was to require the payment of the proper duty or the amount required to make up the same, together with a penalty [see clause (b) of section 37] If this duty and penalty had been paid, then, according to the provisions of section 40, such payment would not have been a bar to the prosecution of any person who appeared to have committed an offence against the stamp law in respect of the instrument. But, under the proviso to section 40, a criminal prosecution could not have been instituted unless it appeared to the Collector that the offence was committed with an intention of evading payment of the proper duty. It appears to us to be clear, from the provisions just referred to, that it was the intention of the Legislature, in the first place, to compel the payment of the stamp-duty together with a penalty. By the payment of the stamp-duty, the revenue would be protected from loss, and the exaction of a small money-penalty would be a sufficient punishment in the large majority of cases in which the omission to stamp at all, or stamp duly, arises from negligence, inadvertence, or ignorance of the provisions of the stamp law. The severer proceeding of a criminal prosecution is intended for those cases only in which there is an intention to evade the stamp law: and, before a criminal prosecution can be instituted, it is incumbent upon the Collector to form an opinion whether it appears him that such intention existed. Now, in the present case, the Collector did not adopt the procedure provided by the law, did not call upon the parties concerned to pay the stamp-duty together with the penalty prescribed by clause (b), section 37. Had he done so, there is no reason to suppose that it would not have been paid. The penalty required by the Moonsiff was apparently higher than it should have been under the

Stamp Act; and it may well have been that the Collector would have required a smaller sum, and that this smaller sum would have been paid by the parties concerned. Then, if the duty, as assessed by the Collector, together with the penalty, had been paid, a criminal prosecution could not have been instituted unless it appeared to the Collector that there had been an intention of evading the proper duty. It is quite possible that the Collector might have been satisfied that no such intention existed, and that the exaction of the stamp-duty and the stamp-penalty may have appeared to him a sufficient vindication of the interests of the public revenue. We may observe that, as the arbitrators did not claim any benefits under the award, and could receive no advantage from the non-payment of the stamp-duty, it is not easy to see how they could have had an intention of evading the stamp law. The Stamp Act is a fiscal enactment, and must be strictly construed; and, before any person can be punished for an offence relating to the stamp-revenue, the procedure prescribed by the Act must be strictly followed. "If," said Lord MANSFIELD in *Hartley vs. Hooker*, 2 Cowper 523, "a new offence is created by Statute, and a special jurisdiction out of the course of the Common Law is prescribed, it must be followed. If not strictly pursued, all is a nullity and *coram non judice*." We are therefore of opinion that, as the course of procedure prescribed by the Act was not followed in this case, the prosecution before the Deputy Magistrate was unwarranted, and the conviction is bad in law. We reverse the conviction, and direct that the fines, if paid, be refunded.

1881  
 EMPRESS  
 v.  
 SODDANUND  
 MAHANTY.  
 Judgment.  
 FIELD, J.

## [CRIMINAL JURISDICTION.]

• 1882  
Feb. 21st.

No. 20 of  
1882.

NOBIN CHUNDER BANIKYA . . . . . APPELLANT;  
AND  
EMPRESS . . . . . RESPONDENT.

*Criminal Procedure Code (Act X. of 1872), section 349—Order under section 349 of Act X. of 1872—Limitation—Pardon, Withdrawal of.*

*Per MITTER, J.*—The power of a Sessions Court to make an order under section 349 of Act X. of 1872, withdrawing a pardon, must be exercised before judgment has been passed. Accordingly, where a Sessions Judge, at the end of his judgment, recorded an order that a witness to whom a pardon had been tendered under section 347 should be prosecuted, the pardon being withdrawn on the ground that the conditions upon which it had been tendered had not been complied with, and the witness was prosecuted and convicted, the conviction was illegal.

*Per MACLEAN, J.*—Where an order is made by a Court of Session under section 349 of Act X. of 1872 withdrawing a pardon, it is sufficient, for the validity of such order, that "it appeared to the Court of Session, before judgment was passed," that the witness had not conformed to the conditions of the pardon, notwithstanding that the order be made at the end of the judgment in the case.

*Per MACLEAN, J.*—Where a trial has been improperly originated, the High Court has power to set aside a conviction on such trial.

**A**PPEAL from a conviction and sentence passed by the Sessions Judge of Mymensingh on the 20th day of February 1882.

*M. M. Ghose and Baboo Anund Gopal Palit*, for Appellant,  
*Branson and Baboo Kaly Churn Bancrjee*, for the Crown.

The facts are fully stated in the judgments of the learned Judges of the High Court (1), which were as follow:—

(1) MITTER and MACLEAN, JJ.

MITTER, J.—The appellant has been convicted of the offence of abetment of murder (sections  $\frac{302}{114}$ ) of a person named Modun Banikya, and sentenced to transportation for life. The assessors were for acquitting the appellant. That, on the night of Friday, the 8th Joist last (20th May), Modun was murdered in his hut while asleep, and, on the following morning, his corpse was discovered with a ramdao lying near it, is proved beyond the possibility of a doubt. It appears that the appellant was suspected of having committed this murder, and was arrested by the Police on the 22nd May, and *challaned* on the 30th May. On the 31st May, the appellant made a statement to the Deputy Magistrate in charge of the sub-division within which the murder was committed, confessing his guilt, and implicating one Ram Kisto Banikya and four other Mussulmans of his village. On the 7th June, the Deputy Magistrate, under section 347 of the Criminal Procedure Code, tendered pardon to the appellant, who, having accepted the tender, was examined as a witness in the case which was prosecuted against Ram Kisto and the four aforesaid Mussulmans. It was ultimately committed for trial in the Sessions Court. In the Sessions trial, which was held by Mr. Kirkood, the appellant was examined as a witness on the 27th July. His evidence was substantially the same as that given by him before the committing officer. On the 28th July, after the first witness for the defence had been examined, the assessors intimated to the Judge that, in their opinion, the evidence adduced on behalf of the prosecution was not sufficient to warrant a conviction. The Judge, concurring in that opinion, stopped the trial, and, on the following day, delivered his written judgment, acquitting the persons then on their trial. At the end of the judgment, he recorded an order directing the Magistrate to commit the appellant to be tried for the murder of Modun, as it appeared to him that the appellant, having been guilty of wilful concealment of essential facts, and of giving false evidence against Ram Kisto, had not conformed to the conditions under which the pardon had been tendered to him. This order was passed under section 349 of the Criminal Procedure Code. The appellant was ultimately committed and convicted as stated above.

1882

NOBIN  
CHUNDER  
BANIKYAv.  
EMPRESS.

Judgment.

MITTER, J.

1882

NOBIN  
CHUNDER  
BANIKYA

v.  
EMPRESS.

*Judgment.*

MITTER, J.

The present Sessions Judge, Mr. Beighton, in support of his conclusion, relies chiefly upon the appellant's statements made from time to time while under pardon, and thinks that they are corroborated by the fact that the ramdao, which was found lying near the corpse of the murdered man, is proved to have been purchased by the appellant from a blacksmith named Ram Gopal about 15 or 16 days before the occurrence.

The learned Counsel, who appeared for the appellant before us, contended (1) that the order of Mr. Kirkwood under section 349 of the Criminal Procedure Code, directing the appellant to be committed, having been made after the judgment was passed, was not warranted by the provisions of that section; (2) that, notwithstanding the express provision of section 349 of the Criminal Procedure Code, the statements of the appellant, while under pardon, should not have been allowed to be put in evidence, inasmuch as these statements, amounting to a confession of guilt on the part of the appellant, are not relevant under section 24 of the Evidence Act; (3) that the finding of the Sessions Judge is against the weight of the evidence on the record.

It has been urged by the learned Counsel who appeared before us to support the conviction that Mr. Kirkwood's order under section 349 of the Criminal Procedure Code is in accordance with the provisions of that section, because it is clear from his judgment that it appeared to him, before it was passed, that the appellant had not conformed to the conditions under which the pardon was tendered, and that the section only requires that the Court of Session should come to the conclusion before the judgment has been passed; and that, if this condition be fulfilled, the actual order directing the commitment may be passed at any time without any limitation.

I am of opinion that the order of Mr. Kirkwood, withdrawing the pardon to the appellant, and directing him to be committed, was passed contrary to the provisions of section 349 of the Criminal Procedure Code. It appears to me that the words "before judgment has been passed" have been inserted in the section with a view to put a limitation in respect of the time within which the power of the withdrawal of the pardon conferred

red on the Court of Session *may be actually exercised*. The intention of the Legislature would not be attained if we put upon the section the construction for which the learned Counsel, who appeared in support of the conviction, contends. According to his contention, a person to whom a pardon has been tendered under the provisions of section 349 may be ordered to be committed by the Court of Session after the lapse of any length of time, provided it would appear that, before the judgment was passed, it had come to the conclusion that he had not conformed to the conditions under which the pardon was tendered. It seems to me that this is not a reasonable construction. It frustrates the very object for which this limitation of time is laid down. In my opinion, the power of directing commitment, conferred by the section in question upon the Court of Session, can be exercised only before the judgment has been passed. In this case, therefore, Mr Kirkwood, after passing the judgment in the case in which the appellant was examined as a witness under the provisions of section 347 of the Criminal Procedure Code, had no power to withdraw the pardon granted to him, and direct his commitment. The subsequent trial of the appellant is consequently illegal. The conviction cannot, therefore, stand. In this view, which I take of this question of law, it is unnecessary for me to express any opinion upon the other objections urged before us against the validity of the conviction. I would, therefore, reverse the conviction, and direct his release.

1882

NOBIN  
CHUNDER  
BANIKYA  
v.  
EMPRESS.

Judgment.

MITTER, J.

MACLEAN, J.—The appellant, stated in the record to be 20 years of age, was placed before the Magistrate, charged, on his own confession, with abetment of the murder of one Modun Banikya. The Magistrate thought proper to tender to him a pardon under section 347 of the Procedure Code, with a view to procuring the conviction of four other persons also charged with the murder. The appellant accepted the pardon, and was examined before the Magistrate on the 7th June last. The other persons were committed for trial, and the appellant gave his deposition on the 27th July. On the 28th July, the assessors, at the close of the evidence of the first witness for the defence, intimated that they had made up their minds, and

MACLEAN, J.



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NOBIN  
CHUNDER  
BANIKYA

v.  
EMPRESS.

Judgment.

MACLEAN, J.

did not wish to hear further evidence. The Judge expressed his concurrence, but no finding was recorded on that day. On the following day, the assessors' opinions were recorded, and judgment delivered, acquitting the persons under trial. At the close of his judgment, the Judge recorded that the appellant had not conformed to the conditions under which the pardon was tendered (section 349 of the Criminal Procedure Code), and he directed that the appellant should be committed for trial for the offence in respect of which the pardon was so tendered.

The appellant was thereafter committed, and had been tried before a different Judge and assessors. The assessors would have acquitted him, but the Judge has convicted him of abetment of murder, and sentenced him to transportation for life.

Before dealing with the merits of the case, two matters have to be disposed of, which Counsel for the appellant have urged against the proceedings before and at the trial.

In the first place, it was urged that the order of the Judge, dated 29th July, directing the commitment of the appellant, was not made "before judgment was passed," and is, therefore, illegal with reference to section 349 of the Procedure Code. Counsel for the prosecution argued against this view of the case that it is not necessary that the order should be made "before judgment is passed," as the section requires only that it shall have "appeared to the Court of Session, before judgment is passed," that the conditions under which pardon was tendered have not been conformed to. I think the correct view of the section is, that it must appear to the Judge, before he passed his judgment, that the conditions of pardon have not been complied with; and, reading the judgment in this case, it is abundantly clear that it did so appear to him. It is impossible to hold that, because the actual order for commitment of the accused was written (although in the judgment) after the acquittal, therefore it did not appear to the Judge, before passing judgment, that there were grounds for his order. The judgment prior to signature must be taken as a whole as representing the view taken by the Judge of the whole case, and nothing would justify us in dealing with it paragraph by

paragraph, and founding any conclusion upon the order in which they come. I therefore reject this objection.

1882  
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 NOBIN
 CHUNDER
 BANIKYA
 &
 EMPRESS.
 ———
Judgment.
 ———
 MACLEAN, J.

The next objection is, that the statement of the appellant under pardon, *viz.*, his deposition on 27th July, was improperly used in evidence against him, although the last clause of section 349 (Procedure Code) directs that it may be put in evidence against him. The argument in support of the objection is, that, by section 24 of the Evidence Act, a confession made by an accused person is irrelevant if it appears to the Court to have been caused by inducement, threat, or promise, &c., and that there is thus a conflict between the Evidence Act, section 24, and the later Act, section 349. The appellant's Counsel asked us to read the last section as if it contained the words "provided it is otherwise admissible in evidence." I must say that, in my opinion, Counsel asked us to reduce the last clause of section 349, Criminal Procedure Code, to an absurdity. I can see no connection whatever between the two sections. The deposition or statement made by the appellant under pardon was not a confession made by an accused person. Appellant was not an accused person on the 27th July. He had ceased to be so on the 7th June when pardon was tendered and accepted. Holding this opinion, I decline to waste any time in considering what are called canons of construction, or supposed inconsistencies between an earlier and a later Act.

I now proceed to deal with the facts of the case. It is admitted that Modun Banikya, the deceased, was, by virtue of his authority as manager of his daughter Hara Sundari's property, manager of a mercantile business having a branch in Calcutta. Appellant was a *gomashta* in this branch. Ram Kisto made a claim against the firm for money, which, it is alleged, had been stolen in Calcutta, and he called upon Modun to pay it. Modun seems to have referred him to the appellant as responsible for it, as he considered that the money had not been entrusted to the firm, but had been put into appellant's hands as agent for Ram Kisto.

According to the statement of the appellant, he persuaded Ram Kisto that no good would come of any attempt to get the money from him (appellant), and that, therefore, Ram

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Kisto suggested to him to murder Modun Banikya. This being done, appellant would be able to get the money from his mother-in-law who had an interest in the firm of which Modun was the manager. Ram Kisto provided three Mahomedans who would commit the deed. They, with Ram Kisto, came to appellant's house. He supplied them with a ramdao, and accompanied them to Modun's house. Two of them entered his house, and a sound of blows was heard. All five men left the place, and, after proceeding a short distance, one of the two who had entered the house said, "I have killed him, but I have left the dao there."

Upon this statement of the case, Ram Kisto and the three Mahomedans were tried for the murder, and the appellant's evidence was the mainstay of the prosecution. The result was the acquittal of all of them. The Judge came to the conclusion that the appellant's statement was wholly false as to Ram Kisto, whom he considered innocent. As to the Mahomedans, the Judge considered that they had been "very probably" hired by the appellant to commit the murder, but he found it impossible to convict any of them on evidence so unreliable as Nobin's.

In the present case, the first point for consideration is, whether the same statement condemned as false in part and, in other respects, untrustworthy by the Judge who tried the first case, and again condemned in many respects by the Judge who tried this case, can be accepted as justifying the appellant's conviction.

I entertain a very strong opinion that the story told by the appellant is in the main true, and that Modun Banikya was murdered with the prisoner's dao and with his knowledge and consent. I share the belief expressed by the two Judges who considered the case, that, as regards Ram Kisto Banikya, the statement is false. My impression is, that the dao having been found by the body of Modun Banikya, the case was so strong against the appellant that he was induced to make such statements as would, while implicating himself in a minor degree, secure, it was thought, the conviction of Ram Kisto. The appellant was evidently in the hands of the Police from

the 22nd to 31st May, and considering his youth and the pressure to which he was evidently subjected, both by the finding of the *dao*, and by the steps taken against his family who were put under restraint, I can quite understand his yielding.

I confess, however, that I cannot justify his prosecution.

The Judge who directed his committal did so on two grounds—

firstly, that he had concealed something essential; *secondly*, that he had given false evidence. This last ground would have justified his trial for the offence, but nothing has transpired at his trial to show that his evidence was false. As regards his own share in the crime, if it is false in that respect, he must be acquitted on the ground that he had nothing to do with the murder. It was not to be expected that he should prove his own perjury, and, therefore, his silence cannot be unfavourably construed. As for the concealment of essential particulars, I am unable to discover it. It rather seems that he has stated false particulars. The result, therefore, of my consideration of the case is, that this trial has properly ended in a conviction, but it is a trial which ought not to have taken place.

But I have, on a previous occasion, held that this Court had no authority to set aside a conviction in a trial properly held. In the case I refer to, there was much that resembles this case. The appellant had accepted a pardon. The Judge considered his statement false, and ordered his trial. The Bench, of which I was a member, held that the appellant's statement was not false, and that the conditions of the pardon had really been complied with. The proper course we then thought to be to uphold the conviction, and refer the case to the Government with a view to pardon, which was done, and the pardon was granted. On re-consideration, however, I think this Court may itself set aside a conviction made upon a trial improperly originated and, on this ground, I would direct the release of the appellant.

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Judgment.

MACLEAN, J.

1881
Nov. 2nd.
—
No. 269 of
1881.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF BANEY MADHUB SHAW }...PETITIONERS.
AND ANOTHER }

Act VII. (B. C.) of 1878, sections 41, 42, and 59—License, Breach of—Licenseholder, Liability of servants of—Excise-officer, Who is.

Notwithstanding the provisions of section 59 of Act VII. (B. C.) of 1878, that the amount of fine in respect of a breach of license may be realized from the master, two or more servants of a licensed vendor of spirits may, on committing a breach of the license, be fined in the full penalty.

Where a license provided that the licensee would "produce for inspection, on demand of any excise-officer above the rank of a head constable or chaprasie, his license and accounts," &c., it was held that an inspector of police, although empowered under section 42 of Act VII. (B. C.) of 1878, was not an excise-officer within the meaning of that Act, and non-compliance with a demand made by such inspector for production of the license did not render the persons, who refused to produce such license, liable to a penalty.

MOTION to set aside the conviction and sentences passed on the petitioners by the Chief Presidency Magistrate on the 7th September 1881.

The grounds upon which the High Court was asked to interfere appear from their judgment below.

Baboo Bamachurn Barerjee, for the Petitioners.

Bonnerjee (Officiating Standing Counsel), for the Crown.

The judgment of the High Court (1) was as follows:—

The petitioners in this case are two servants of a licensed vendor of spirits, who have been convicted, each of them, for having, in breach of their license, *firstly*, sold a bottle of brandy which was carried off, and not drunk on the premises; and,

secondly, for having refused, on the demand of the Police Inspector, to produce their license.

As regards the first breach, an objection is taken that the master, the licensed vendor, was alone liable, and not the servants. Two judgments of this Court have been considered by us on this point—*In the Matter of Ishur Chunder Shaha*, 19 W. R. 34, Criminal Rulings, and the other recently delivered by Mr. Justice PONTIFEX and Mr. Justice FIELD—*Emprass vs. Nuddiar Chand Shaw*, 8 C. L. R. 152. These decisions are in conflict. Our opinion inclines to the decision reported in the 19 W. R.; and, having regard to the fact that that decision was not brought to the notice of the Judges who decided the more recent case, we think that we are justified in following it. We accordingly hold that the conviction of the servants is not necessarily illegal.

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Statement.

The next objection taken is, that, inasmuch as there was only one breach of license in this respect, there should have been only one penalty inflicted, whereas, by reason of the maximum fine having been imposed on each of the servants, the penalty has been doubled. It appears to us that the Magistrate was competent to punish each of the servants separately in the manner he has done if he found, as he apparently has found, that each of them committed a breach of the license. Section 59 of Act VII. (B. C.) of 1878 no doubt declares that the amount may be recoverable from the master, but it does not necessarily follow that the servants may not be liable for the full amount prescribed by the law although possibly the master may reasonably object to be saddled with more than one full penalty for the carelessness or neglect of the servants. We therefore think that the convictions and fines imposed, as regards this breach of the license, should be sustained.

As regards the other penalties for breach of license in consequence of refusal to produce the same on demand of Inspector Fitzgerald, we are of opinion that the convictions and fines must be set aside. It was argued by the learned Standing Counsel, who appears to support the convictions, that, reading sections 41 and 42 together, the officers empowered under section 42, among whom the Inspector in the present

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case is, must be regarded as an Excise-officer within the terms of the Act, and that it would be impossible for a Police-officer, so acting as an Excise-officer, to discharge his duties if he had not power to demand the production of a license. But, although he might properly demand the production of the license, and, on refusal to produce it, proceed to arrest or to confiscate as allowed by the Act, it would not necessarily follow that such refusal would render the license-holder or his servants liable to fine under section 59 for breach of the license unless it were expressly provided that he or they were bound to produce it. The condition contained in the license is to the following effect: "That he" (the license-holder) "produce for inspection, on demand of any Excise-officer above the rank of a head constable or chaprasie, his license and accounts," &c.

Now, if the term, the Excise-officer, had alone been used in that clause of the license, we should not be disinclined to hold that it should be interpreted to mean an Excise-officer within the meaning of the Abkari Act, and, therefore, a Police-officer.

Inspector Fitzgerald was duly empowered under section 42; but, inasmuch as that clause of the license proceeds to declare that the Excise-officer must be above the rank of a head constable or chaprasie, we are of opinion that it was the intention of those who drew up this form of the license that the Excise-officer should be an Excise-officer of the higher grades, such an officer only, and not any Police-officer, who may be exercising the powers of an Excise-officer. In this view of the terms of the license, we think that the conviction, as regards the second breach, must be set aside, and the fines, if paid, refunded.

[CRIMINAL APPELLATE JURISDICTION.]

BUDHUN RUJWAR APPELLANT;
 AND
 EMPRESS RESPONDENT.

1882
 Mar. 13th.
 No. 91 of
 1882.

Penal Code (Act XLV. of 1860), section 75—Previous conviction.

An accused person can only be punished under section 75 of the Indian Penal Code where the previous conviction has been under that Code.

APPEAL from a conviction and sentence passed, on the 25th January 1882, by the Sessions Judge of Sahibgunge. The appellant was accused of theft from a dwelling-house. It appeared that he had been previously convicted of an offence before the Indian Penal Code became law; and the Sessions Judge, taking that conviction into consideration, sentenced the accused, under section 75 of the Indian Penal Code, to 7 years' imprisonment. Against the conviction and sentence, this appeal has been preferred.

The judgment of the High Court (1) was as follows:—

There is a technical irregularity in the conviction of this prisoner, inasmuch as, when the first conviction took place, the Indian Penal Code was not in force, and then section 75 does not apply to this case. But, inasmuch as the sentence was not more than might have been passed in the absence of any previous conviction, we see no reason to interfere.

(1) CUNNINGHAM and TOTTENHAM, JJ.

[CRIMINAL JURISDICTION.]

1882
Feb. 7th.
No. 695 of
1881.

SREENATH KUR. APPELLANT;
AND
EMPRESS RESPONDENT.

Penal Code (Act XLV. of 1860), sections 167 and 466—Criminal Procedure Code (Act X. of 1872), section 453—Offences of same kind.

The offences under sections 167 and 466 of the Penal Code respectively are not of the same kind within the meaning of section 453 of the Criminal Procedure Code (Act X. of 1872).

APPEAL from a conviction and sentence passed by the Sessions Judge of Mymensingh.

The facts are stated in the judgment of the High Court.

A. M. Bose and *Baboo Kali Churn Banerjee*, for the Appellant.

Paul (Advocate-General), for the Crown.

The judgment of the High Court (1), which was as follows, was delivered by—

O'KINEALY, J. *O'KINEALY, J.*—In this case the prisoner has been convicted of two offences under section 167 of the Indian Penal Code, and also under sections 466 and 471, which he is said to have committed while accountant of the Judge's Court of Mymensingh. The first conviction relates to the document P, a cheque for Rs. 405-9-6 of money in deposit drawn in favour of one Kristo Kanta Ghose as agent for Denonath Roy. As accountant, the prisoner had charge of all the books and papers connected with his department. He was bound to see, among other things, that the deposit-registers were properly kept up, and, as a fact, most of the entries in these registers are in his handwriting. In connection with repayments, his duties were as follow: On receipt of the local Courts' application, usually made by roobokari, he verified the item by looking at his register, and made out a letter to the Accountant-

General asking him to sanction the repayments. When this officer's sanction was accorded, the prisoner referred to the roobokari to find the name of the payee. He then filled up the cheque, entered the payee's name in it, and having obtained the Judge's signature, delivered the document to the person entitled to receive payment. All matters connected with these repayments were under the immediate control of the prisoner, disposed of by him alone, and no other officer of the Court ever filled up the cheques, or presented them for signature to the Judge. The charge against the prisoner in connection with P is, that, with intent to injure, he framed this cheque in a manner which he knew to be incorrect. The real payee's name was Koonja Kishore Saha, nephew of Makadassya; and, instead of his name, the name of Kisto Kanta Ghose on behalf of •Denonath Roy• was entered in the cheque. Looking at the fact that the prisoner always, as part of his duty, filled up the cheques, that the entry containing the wrong payee's name is proved to be in his handwriting, that Kisto Kanta Ghose is a poor man, a mukhtar's mohurir, related to the prisoner and living with him, and that the proceeds of this cheque have been traced to the joint possession of the peon and the prisoner, we think that there cannot be any possible doubt of the prisoner having committed the offence of which he has been found guilty by the Court of Session.

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 Judgment.
 O'KINEALY, J.

Intimately connected with this portion of the case are the charges laid against the prisoner in regard to P 3. This document purports to be a certified copy of a roobokari, dated the 8th of March 1880, requesting the District Judge to obtain sanction to the payment of a lapsed deposit. That this roobokari has been tampered with, the original schedule erased, and a new schedule entered, is not seriously denied: indeed, the marks of the erasure are plainly visible. But it has been urged that there is not sufficient evidence to bring the act home to the accused. Now, the writing in the schedule is sworn to be similar to that of the prisoner, the document was received from him, and the false entry was made only for the purpose of supporting the scheme for obtaining the money drawn by the cheque P. We think this evidence is suffi-

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ent to convict the prisoner of having forged the document ; but, as there is nothing to show he ever used it, we consider that the conviction under section 471 of the Indian Penal Code should be set aside.

Judgment.
O'KINEALY, J.

The last charge is based on the cheque O. It is similar to that laid on the cheque P. The documents are of the same kind, and the evidence advanced in support of both charges is almost identical. We think the prisoner is guilty on this charge also. We have had some trouble in dealing with this case, owing to the manner in which it has been tried by the lower Court. On the preliminary inquiry before the Deputy Magistrate, the proceedings were allowed to cover a very large number of transactions. The prisoner was committed for trial on 55 charges, and with other persons who were accused of having more or less assisted him in obtaining money from the Government Treasury. These irregularities were perceived by the Sessions Judge ; but, instead of exercising the powers conferred on him by sections 445 and 446 of the Code of Criminal Procedure, and then proceeding to hold separate trials, he adopted the somewhat unusual course of informing the prisoner that he would acquit him of all the charges except those already mentioned, and that, to these, the trial would be confined. Having come to this determination, he failed unfortunately to act up to his own convictions, and under the excuse of giving Government an opportunity of appealing, if necessary, against the acquittals on the other charges, he allowed evidence in regard to them to be adduced by the prosecution. On the other hand, it must be admitted that the Judge recorded the evidence bearing on the selected charges in a compact and succinct form, and it was in respect of them, and them only, that the prisoner was examined and called upon to give any explanation. The selection, too, of these particular charges seems to have been the best that could have been made in favour of the prisoner. Both the cheques P and O referred to transactions of the same date, so that this circumstance greatly facilitated the defence of the prisoner where so much—indeed, we may say his innocence or guilt—turned upon the state of his accounts. Moreover, the charges were confined to acts arising out of two, and only two, transactions of a similar kind in

which the prisoner succeeded in dishonestly and fraudulently obtaining Government money by means of false documents, and, had he been tried at one trial, as he should have been, for obtaining the money, then all the evidence in connection with the present charges would have been properly admitted against him.

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In this Court it has been contended, on behalf of the prisoner, that he should have been tried separately for offences under sections 167 and 446 of the Indian Penal Code, and that he was prejudiced by the irregular manner in which the trial was held in the lower Court. In reply, the Advocate-General asserted that the charges under sections 167 and 466 were of the same kind, and, even if this were not so, still the prisoner had not shown how, or in what manner, he had been prejudiced by the irregularities which had occurred at the trial.

We are of opinion that offences under sections 167 and 466 are not of the same kind as defined in section 453 of the Code of Criminal Procedure. There are several points in which they differ. They are not even in the same Chapter of the Code. Section 167 requires that the accused should be a public servant, but not that he should be actuated by any dishonest or fraudulent intention, while section 466 requires the latter, but not the former. The offences seem to us, therefore, to be different, and not of the same kind, although the same individual may possibly commit both in the same transaction. But we are also of opinion that nothing has been brought to our notice which would support the contention that the prisoner has been prejudiced in his defence by the proceedings in the lower Court. As we have already stated, the selection of the charges to be tried was made in the interest of the prisoner, and the transactions out of which they arose are of the same date and kind and only two in number. Moreover, no objection of this kind was pressed in the lower Court. We, therefore, confirm the convictions of the prisoner except as to that for using a forged document, which we set aside. The sentences will stand, but, instead of the third sentence being entered up on the two convictions, *viz.*, under sections 466 and 471, Indian Penal Code, it will be entered up on section 466, Indian Penal Code, only.

[CRIMINAL.]

C. L. R. 93.—j.

[CRIMINAL JURISDICTION.]

1882
Mar. 15th.

No. 31 of
1882.

IN THE MATTER OF CHAROO CHUNDRA } ... PETITIONER.
MULLICK

Criminal Procedure Code (Act X. of 1872), section. 491—Summons to appear—Non-resident zemindar—Bond to keep the peace.

A summons setting out that the person to whom it is directed is charged with an offence under section 491 of the Criminal Procedure Code, and requiring his personal appearance in Court, is not such a summons as is required by that section.

A non-resident zemindar cannot be bound over to keep the peace because his local agents are committing acts likely to cause a breach of the peace.

MOTION to set aside summons issued and an order made by the Deputy Magistrate of Jessore.

M. P. Gasper, Baboo Saroda Churn Mitter, and Baboo Jogesh Chunder Dey, for the Petitioner.

No one appeared for the Opposite Party.

The facts are sufficiently set forth in the following judgment of the High Court (1); which was delivered by—

TOTTENHAM, J.—The first prayer of this petition is, that this Court may quash a summons issued by the Deputy Magistrate on the 26th of January last, requiring the personal appearance before him of Baboo Charoo Chundra Mullick under section 491 of the Criminal Procedure Code.

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Judgment.
TOTTEN-
HAM, J.

We have no doubt that that summons is illegal in form. It sets out that the person summoned is charged with an offence under section 491 of the Criminal Procedure Code, and requires his personal appearance in the Court of the Deputy Magistrate, but it does not state any of the matters which the law requires to be set out in a summons under that section. We therefore think that this summons is bad in law, and we accordingly order that it be set aside.

It appears that, previously in October, a notice under section 491, which was substantially proper in form, was issued to Charoo Chundra Mullick, as well as to other parties said to be concerned in a dispute. Before that, Charoo Chundra applied and was permitted to appear by his agent, and evidence was gone into. When the whole evidence was recorded, the Deputy Magistrate bound over certain parties concerned, but, in that judgment, he made no mention of any proof against Charoo Chundra Mullick that he was about to commit a breach of the peace, or to do any act likely to result in a breach of the peace. He, however, ordered him to be summoned to appear in person. It seems clear, therefore, that the Deputy Magistrate intended, upon his appearance, to bind him over.

Baboo Charoo Chundra Mullick, upon this, put in a petition through his mukhtar still to be allowed to appear through his agent. That petition was rejected on the 23rd January, and the summons just mentioned was drawn up on the 26th. Upon a petition being presented to this Court under section 297, the Bench which heard it directed the record to be sent for, and the Deputy Magistrate called upon to explain the grounds of his order requiring the personal appearance of the accused.

An explanation has accordingly been submitted, and from

(1) CUNNINGHAM and TOTTENHAM, JJ.

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HAM, J.

it it is quite clear that the Deputy Magistrate intended to bind the petitioner over. In his application the petitioner does not ask us to set aside these proceedings altogether, but only to quash the last-mentioned summons, namely, that of the 26th January. He also prays the Court to direct that, in the event of it being thought necessary to bind him over to keep the peace, he may be permitted to sign the bond through an authorized mukhtar. We have already set aside the summons of the 26th January, and we think that the other part of the prayer is reasonable, and that no cause against it has been shown by the Deputy Magistrate. The learned Counsel for the petitioner has assured us that there is not one particle of evidence in the whole record making out such facts as, under section 491, would justify the Deputy Magistrate in binding over his client. It is not necessary for us to go into the facts, but we think it well to direct the Magistrate's attention to the provisions of section 491, and to point out to him that an order binding over a person to keep the peace is not necessitated unless there is legal proof that the person implicated is actually about to commit a breach of the peace, or to do some act likely to cause a breach of the peace. It has been ruled more than once that a non-resident zemindar cannot be bound over to keep the peace, merely because his local agents are committing acts likely to cause breach of the peace.

With these remarks we direct that the record be sent back.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF DABEE MAHTO . . . APPELLANT;
 AND
 RAM MOHUN MOOKHOPADHYA . . . RESPONDENT.

1882
 April 4th.
 No. 81 of
 1882.

Penal Code (Act XLV. of 1860), section 193—Fabricating false evidence.

A certain alleged mokurruri tenure having been set aside by a Civil Court, the person who had claimed to hold such tenure, in depositing money in Court, in a petition stated that the deposit was in respect of the mokurruri tenure, whereupon he was charged and convicted under section 193 of the Indian Penal Code with fabricating false evidence.

Held that the conviction was bad.

MOTION to set aside a conviction and sentence passed by the Judicial Commissioner of Chota Nagpore on the 4th February 1882.

Baboo *Opendro Chunder Bose*, for the Petitioners.

The facts appear from the judgment of the High Court (1), which was as follows:—

In this case the prisoner Dabee Mahto has been convicted upon the following charge: "That you, on or about the 27th or 28th day of March 1881, at Govindpur, did, in depositing money in cutcherry, intentionally make a false statement in the petition of deposit, *i. e.*, did say that the deposit was for mokurruri tenure, and that you did thereby fabricate false evidence, and thereby committed an offence under section 193, Indian Penal Code." Now, there appears to be no doubt that the accused did deposit his rent in Court under the provisions of the Rent Act, and that, upon the occasion of so depositing the rent, he put in a petition in which he stated that the rent was deposited for a mokurruri tenure. The case for the prosecution is, that, in previous civil proceedings, this mokurruri tenure had been set aside, and that, therefore, when stating that

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the tenure for which the rent was deposited was a mokurruri tenure, he intentionally stated what he knew to be false. If this were so, the prisoner ought to have been charged with making a declaration under section 47 of Act VIII. (B. C.) of 1869, which declaration contained an averment which he knew or believed to be false, or did not know or believe to be true, and that he was therefore subject to punishment according to the law for intentionally giving false evidence, *viz.*, section 193 of the Penal Code. It is not necessary for us to say whether, if a charge in this form had been made, it could have been supported. Under the circumstances, it is quite possible that, although the mokurruri tenure set up by the accused had been set aside in the previous proceedings, he, under a misapprehension of the effect of this judgment, or a misapprehension of the provisions of the local Rent Act under which his tenure might have been protected from enhancement, felt himself satisfied in describing the tenure as a mokurruri one, notwithstanding the judgment just referred to. It may also be that the mere description of the tenure as a mokurruri one was not an averment within the meaning of section 47 of the Act. We think that it is unnecessary for us to enter into these questions. What the prisoner has been convicted of is "fabricating false evidence," and it is impossible to conceive how the statement contained in this particular petition could be used by the accused as evidence to prove any matter. We think that the conviction for fabricating false evidence is altogether incapable of being supported, and we therefore set it aside, and direct that the prisoner be released.

[CRIMINAL APPELLATE JURISDICTION.]

UTTOM KOONDOO AND ANOTHER APPELLANTS;
 AND
 THE EMPRESS RESPONDENT.

1882
 Mar. 31st.
 No. 143 of
 1882.

Criminal Procedure Code (Act X. of 1872), section 453—Penal Code, sections 411 and 413—Offences of same kind.

The offence of receiving or retaining stolen property, punishable under section 411, and of habitually receiving or dealing in such property, punishable under section 413 of the Indian Penal Code, are not offences of the same kind within the meaning of section 453 of the Criminal Procedure Code.

APPEAL from a conviction and sentence passed by the Sessions Judge of Jessore on the 10th January 1882.

The facts are stated in the judgment of the High Court (1), which was as follows:—

In this case two persons, Uttom Koondoo and Kristo Moni Telini, were committed on seven different charges of dishonestly retaining stolen property (section 411 of the Penal Code), and habitually dealing in stolen property (section 413 of the Penal Code).

The Sessions Judge* tried them on seven charges together, and recorded the following finding: "Concurring with the assessors, the Court finds that Uttom Koondoo and Kristo Moni Telini are guilty of the offences specified in the first seven headings of the charges, *viz.*, that they dishonestly retained stolen property belonging to Nobin Ghose, Modun Shaha,

(1) McDONELL and FIELD, JJ.

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Meajan, Sonatone Ghose, Nobo Coomar Chatterjee, Tamizuddin, and Poroosoola, knowing or having reason to believe the same to be stolen, and thereby committed an offence punishable under section 411 of the Indian Penal Code, and the Court directs that the said Uttom Koondoo be sentenced to rigorous imprisonment for five years, and Kristo Moni Telini to rigorous imprisonment for three years. Further that Uttom Koondoo pay a fine of Rs. 100, and, in default, suffer rigorous imprisonment for one year."

There is no finding or sentence under section 413 of the Penal Code.

The Sessions Judge erroneously speaks of the "seven headings of the charge." There were seven distinct charges, not seven headings of one charge. Upon conviction on a single charge under section 411, three years is the maximum term of imprisonment that could have been directed.

Regard being had to the provisions of section 453 of the Code of Criminal Procedure, the prisoners could not have been charged and tried at the same time for more than three offences of the same kind. The Sessions Judge was, therefore, wrong in trying the seven charges together.

The appellants do not, however, complain of this irregularity in procedure; and it does not appear that the irregularity has occasioned a failure of justice either by affecting the due conduct of the prosecutors, or by prejudicing the prisoner in his defence (section 283, Code of Criminal Procedure). We, therefore, think it unnecessary to set aside the proceedings of the Sessions Judge, and direct a new trial; but the conviction and sentence must be set aside, and the prisoners will be convicted upon the three charges concerned with the property of (1) Nobin Ghose, (2) Meajan, and (3) Poroosoola. For the first and second offence, the prisoners will be sentenced each to one year's rigorous imprisonment in respect of each charge. For the third offence, Uttom Koondoo will be sentenced to three years' rigorous imprisonment and Kristo Moni Telini to one year's rigorous imprisonment.

We think a sentence of fine unnecessary.

We may observe that the prisoners could not be tried at the same trial for receiving or retaining (section 411), and habitually receiving or dealing, in stolen property (section 413), these two offences not being offences of the same kind (section 453 of the Code of Criminal Procedure). The proper course would have been to try the accused first for the offences under section 411; and then, if he were convicted, to try him for the offence under section 413, putting in as evidence the previous convictions under section 411, and proving the finding of the rest of the property in respect of which no separate charge under section 411 could be made or tried by reason of the provisions of section 453 of the Code of Criminal Procedure.

As, however, the punishment awarded under section 411 is, in our opinion, sufficient, it is unnecessary to proceed further under section 413.

The appeal will be dismissed, the conviction and sentence being altered as above directed.

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 ———
Judgment.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF RAM KUMAR PETITIONER

1882
 Mar. 31st.
 No. 59 of
 1882.

*Act V. (B. C.) of 1861, section 29—Police-officers. **

Section 29 of Act V. (B. C.) of 1861 is not applicable to persons who are not police-officers.

Where a Magistrate, acting merely on certain information contained in a letter addressed to him, convicted a person for obstruction and nuisance, the High Court set aside the conviction on the ground that there was no complaint and no evidence.

MOTION to set aside a conviction and sentence of the Magistrate of Chittagong dated the 31st December 1881.

Palit and Baboo *Kali Churn Banerjee*, for the Petitioner.

The facts appear from the judgment of the High Court (1), which was as follows:—

This is an application on behalf of one Raj Coomar Guho, who alleges himself to be the Secretary of the Chittagong

(1) McDONELL and FIELD, JJ.

Brahmo Somaj. It is alleged that, on the 28th December last, the members of the Brahmo Somaj were proceeding in a sort of religious procession through the town of Chittagong; that they were met by one Mr. Good; that an altercation took place between Mr. Good and certain members of the Brahmo Somaj; that, in consequence of what occurred on this occasion, Mr. Good addressed a letter to the Magistrate of Chittagong on the 31st December; whereupon the Magistrate made the following order: "The Secretary to the Brahmo Somaj is fined Rs. 10 only for the obstruction and nuisance. The Town Sub-Inspector is fined Rs. 10 (ten rupees) for neglect of duty, and Salimaddeen, head constable of the beat, is fined Rs. 3 (three rupees) only." Then comes the Magistrate's signature, and below this are the words: "Section 29, Act V. of 1861." Now, as to the merits of the matter, we have no evidence before us, and we pronounce no opinion whatever. We deal with the case on one ground only, and that is, that there being no complaint and no evidence recorded, the petitioner before us, Raj Coomar Guho, could not have been legally convicted and sentenced to pay a fine. Section 29 of the Police Act, V. (B. C.) of 1861, refers to cases of neglect of duty, &c., committed by police-officers, and could not have application to Raj Coomar, who is not a police-officer. We must, therefore, set aside the conviction, so far as the petitioner is concerned; and direct that the fine, if realized, be refunded.

1882

In re

RAM KUMAR.

Judgment.

[CRIMINAL REVISIONAL JURISDICTION.]

1881
Dec. 21st.
—
No. 265 of
1881.

AZIM MOLLAH AND OTHERS PETITIONERS;

AND

SATOO PORAMANICK AND OTHERS. PARTIES.

Criminal Procedure Code (Act X. of 1872), section 53c—Possession—Dispute as to a number of plots of land—Procedure—Practice.

A dispute having arisen as to the possession of 109 plots of land, to which a claim to possession was made by the ryots of village A on the one hand, and by the ryots of village B on the other, the Magistrate instituted a proceeding under section 530 of the Criminal Procedure Code in respect of all the 109 plots, but, having taken evidence, dealt in his order with 12 only, directing that the ryots of village B should be kept in possession.

Held that, it appearing that all the 109 plots were covered by the same state of circumstances, the Magistrate had exercised a sound discretion in acting as he did.

MOTION, under section 297 of the Criminal Procedure Code, to set aside an order passed by the Joint Magistrate of Seraj-gunge on the 5th August 1881.

In this case, there was a dispute in respect of 109 plots of land. The ryots of two villages, Boinnadiar and Khamar Salina, respectively, claimed to be in possession of the plots in question. The zemindars, under whom the ryots of the latter village claimed, were registered as the zemindars of the disputed lands.

The Joint Magistrate instituted one proceeding in respect of the 109 plots, but, in his judgment, dealt only with 12 of them, and made an order in favour of the ryots of the Boinnadiar village. It was now sought to have that order set aside on the following (among other) grounds:—

(1.) That the Magistrate ought not to have instituted one proceeding only in respect of all plots, inasmuch as the

parties were different in the different parcels of land, and there was no community of interest in the entire land.

(2.) That, assuming the legality of the proceedings, the Joint Magistrate should have dealt with the dispute, so far as it affected each plot separately, on the evidence adduced in regard to it.

(3.) That the zemindars of the village of Khamar Salina having been registered as proprietors of the land, a presumption should have been made in favour of the possession of their tenants.

Baboo *Saroda Persad Roy* appeared for the Petitioners.

Baboo *Gopaul Lall Mitter*, for the other Parties

The judgment of the High Court (1) was as follows:—

We think in this case that the order made by the Magistrate is substantially correct, and that we ought not to interfere. It appears that there were 109 plots of land, of which the ryots of Khamar Salina claimed to be in possession as pykast tenants; on the other hand, the ryots of Boinnadiar claimed possession of those lands as belonging to their village, and as held under the zemindars of that village. Now the Magistrate instituted a proceeding with respect to all these 109 plots of lands, but he only proceeded to deal with 12 of those plots. An objection has been taken before us that the Magistrate ought not, under section 530, to have included the 109 plots of land within one proceeding; and that, even if he did so, he ought to have separately tried the case of each plot upon the evidence taken with regard to each instead of relying upon the evidence adduced in respect of all of them together. Now, it seems clear to us that the whole of the 109 plots of land were covered by the same state of circumstances, *viz.*, that they were claimed by the tenants of Khamar Salina as their pykast land held by them in the village of Boinnadiar, while they were claimed by the ryots of the latter village as holding under zemindars who, in the Collector's Court in the registration-proceedings, had been declared as zemindars of that village. We think that the Magistrate exercised a very sound discretion in dealing with the case as he did. Another of the

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AZIM

MOLLAH

v.

SATOO PORAMANICK.

Judgment.

1881

AZIM
MOLLAHSATOOR PORA-
MANICK.

Judgment.

objections taken before us is, that the Magistrate was not justified in relying in his judgment upon certain criminal proceedings as evidence. He insisted that he founded his judgment on the result of those criminal proceedings as stated by him, although, in fact, the result of those criminal proceedings have been overruled by the superior Court since his judgment was pronounced. Now it is true that, in his judgment, the Magistrate does refer to these proceedings, and it is quite possible that he allowed them to influence his mind to some extent; but it also appears from his judgment that he comes to his conclusion upon quite independent grounds. He states that it is admitted by all parties, by the Boinnadiar men as well as the Khamar Salina men, that the Khamar Salina ryots had been three years previously in undisputed possession of those 109 plots of land as pykast tenants. He goes on to say that the Boinnadiar tenants alleged that, three years ago, the Khamar Salina men were turned out of such possession, and that, thereupon, the zemindars of Boinnadiar gave leases to them, although the kabuliats were not executed until two years afterwards. Upon that admission, the Magistrate says that the *onus* was on the Boinnadiar claimants to prove that the Khamar Salina men had been turned out of possession three years ago as alleged. But, beyond that, he actually found upon the evidence before him that the Khamar Salina men had cultivated and ploughed the land in question within the present year. He says that evidence had been given that the Boinnadiar ryots had also ploughed this land within the present year, and he says that it is possible that may have been the case, but he does not come to the conclusion that he did with respect to the Khamar Salina men, *vis.*, that it was proved that they had actually ploughed within the year. Now, if, upon the evidence, he found that the Khamar Salina men had ploughed the land this year, and if he also found that it was admitted that they were in possession as pykast tenants three years ago, and there was no proof that, in the interval, they had been excluded and turned out of possession, I think he was quite justified in coming to the conclusion that their possession was such that, under the law, he might make an order in their favour. The application will be dismissed.

[CRIMINAL JURISDICTION.]

MOHESH CHUNDER KOPALI PETITIONER

AND

MOHESH CHUNDER DASS OPPOSITE PARTY.

1882
Jan. 18th.No. 235 of
1882.*Evidence—Accused person.*

A charge of theft having been laid against A and B, process was issued against A only, and, upon his being put upon his trial, B, who had not been arrested, was produced as a witness for the defence.

Held that his evidence was admissible.

Queen vs. Ashruf Sheik, 6 W. R., Cr., 91, and *Reg. vs. Hanmanta*, I. L. R., 1 Bom. 610, distinguished.

REFERENCE, under section 296 of the Criminal Procedure Code, in respect of a conviction made by a Bench of Magistrates presided over by the Deputy Magistrate of Faridpore.

It appeared that Mohesh Chunder Dass and Dulaladee had been jointly charged with the theft of paddy.

Process was issued against the former, and he was duly brought up for trial before the Bench. At the trial, Dulaladee, against whom no process had been issued, was produced as a witness in his defence. The Court refused to receive his evidence. Mohesh Chunder Dass was convicted.

1882

MOHESH
CHUNDER
KOPALI

v.

MOHESH
CHUNDER
DASS.Judgment.

An application was thereupon made to the Magistrate of the District, who, on the 17th December 1881, referred the matter for the opinion of the High Court.

The following order was made by the High Court (1):—

In this case Mohesh Chunder Dass and Dulaladee were jointly accused of stealing paddy. The Magistrate issued process against Mohesh Chunder Dass only. At the trial, Dulaladee was produced as a witness for the defence; but the Magistrate refused to receive his evidence on the ground that he was an accused person, and, as such, was within the rulings in the cases of *Queen vs. Ashruff Sheik*, 6 W. R. 91, and *Reg. vs. Hanmanta*, I. L. R., 1 Bom. 610. There is no analogy between those cases and the present. In the two former cases, the persons whose evidence was tendered had been arrested, and were actually undischarged prisoners when they were produced as witnesses; but, in the present case, the witness had never been arrested at all, and was in no sense a prisoner. We think the evidence of Dulaladee should have been received, and, setting aside the conviction and sentence, direct that the prisoner be tried. The remarks made by the Magistrate in the judgment, that the evidence of Dulaladee, if examined, would, he thought, in no way alter the merits of the case, is, in our opinion, very improper. It indicates a pre-determination to pre-judge the case, which is highly unbecoming a judicial officer. Under these circumstances we think the case should be withdrawn from the Bench, and be tried either by the District Magistrate or such other officer as he may direct.

(1) MORRIS and O'KINEALY, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF MOHESH CHUNDRA }
 ROY AND ANOTHER }... PETITIONERS.

1882
 Jan. 5th.

Criminal Procedure Code (Act X. of 1872), section 502—Recognisance—Forfeiture of recognisance.

No. 91C. of
 1882.

An order estreating a recognisance or a bail-bond must be made upon evidence duly recorded in the case, and not upon evidence taken in other cases.

Where a Magistrate makes an order forfeiting a recognisance under section 502 of the Criminal Procedure Code, the terms of the section must be strictly followed. It is not competent to direct that, in default of payment, the person whose recognisance is forfeited should be imprisoned without first issuing a warrant for the attachment and sale of their immoveable property.

REFERENCE submitted by the Sessions Judge of Pubna and Bogra under section 296 of Act X. of 1872.

It appeared that, on the 9th September 1881, the Joint Magistrate of Serajgunge directed that Mohesh Chundra Roy should pay Rs. 300 under his recognisance, and that Roodro Nath Roy, his surety, should pay Rs. 500, the amount for which he had given a surety-bond, and, in default, that they should be imprisoned.

The Sessions Judge, before whom the matter was laid, referred it to the High Court on the ground that the Joint Magistrate had not made the order upon any evidence before him showing that the conditions of the recognisance and bail-bond had been broken. The Joint Magistrate had, it seemed, acted upon evidence taken in respect of another case.

The following opinions on the Reference were given by the High Court (1):—

FIELD, J.—The discursive letter, with which this reference has been submitted, does not place before us very intelligibly the facts of the case, and what the Sessions Judge considers to be the errors in law committed by the Joint Magistrate.

FIELD, J.

(1) TOTTENHAM and FIELD, JJ.

[CRIMINAL.]

C. L. R. 93.—1.

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MOHESH
CHUNDRA
ROY.

Judgment.

FIELD, J.

The attention of the Sessions Judge is called to the directions contained in Circular Order No. 18 of 15th July 1860 (General Rules and Circular Orders, Criminal, page 110).

The Sessions Judge proposes the setting aside of the order of the Joint Magistrate of Serajgunge dated 9th September 1881, and made under section 502 of the Code of Criminal Procedure. This order directed the estreatment of the recognisances of one Mohesh Chundra Roy and the bail-bond of his surety, the recognisances and bail-bond having been executed for keeping the peace. The error in the Joint Magistrate's proceedings is, that his order has been made without evidence, taken in respect of this matter, that Mohesh had broken the conditions of his recognisances by committing a fresh breach of the peace, the evidence upon which the Joint Magistrate has actually relied being evidence in another criminal case against Isshur. I think that the Joint Magistrate has, in fact, made his order for estreatment upon evidence taken in other cases, and not in the matter of Mohesh and his surety. His order must, therefore, be set aside, and he will be directed to commence proceedings *de novo*.

TOTTEN-
HAM, J.

TOTTENHAM, J.—I agree to the proposed order. The parties called upon to forfeit the amounts of the recognisance and the security-bond are entitled to demand an exact compliance with the provisions of the law. It appears to me that, besides the defect noticed by my learned colleague, the proceedings are further open to the objection that the Joint Magistrate did not, before calling upon the petitioners to show cause, record the grounds of the proof that the recognisance and bond had been forfeited.

Further, his final order was not according to law, for he was not competent to direct that, in default of payment, the petitioners should be imprisoned without first issuing a warrant for the attachment and sale of their moveable property.

They are liable to imprisonment only if the penalties be not paid, and cannot be recovered by attachment and sale.

The order is set aside, and any amount that has been levied under it must be refunded. The Joint Magistrate can proceed *de novo* according to law.

[CRIMINAL APPELLATE JURISDICTION.]

PARAMESHWARI SURMA APPELLANT ;

AND

EMPRESS RESPONDENT.

188a

June 21st.

No. 280 of
1882.

*Penal Code (Act XLV. of 1860), sections 109 and 363—Kidnapping—
Lawful guardian of child—Custody of children.*

A Hindu female child of about 6 years having been secretly removed by its mother in concert with the accused, and, without the knowledge or consent of its father, given in marriage, the accused was charged and convicted under sections 109 and 363 of the Indian Penal Code with abetting the offence of kidnapping.

Held that there had been a taking of the child from the lawful guardianship of the father, and that the conviction was right.

Although, under ordinary circumstances, the custody of the mother of an infant child is the custody of the father, there is no authority in Hindu Law for the proposition that a mother can ever have a right to the custody of her legitimate children adverse to the father.

[CRIMINAL.]

C. L. R. 94.

1882

PARAMESH-
WARI SURMA

v.

EMPRESS.

Judgment.

APPEAL from a conviction and sentence passed by the Sessions Judge of Chittagong on the 10th May 1882.

Baboo *Durga Mohun Das*, for the Appellant,

The *Deputy Legal Remembrancer*, for the Crown.

The facts are set out in the judgment of the High Court (1), which was as follows:—

The conviction in this case was one under sections 109 and 363 of the Indian Penal Code, for abetting the offence of kidnapping. Upon the appeal, two questions were argued: *first*, whether the substantive offence was committed; *secondly*, whether there was sufficient evidence of abetment. The second question we may dismiss at once by saying that, if the substantive offence was committed, there was ample evidence of abetment. The real question is as to the kidnapping. The facts proved appear to be the following: Parameshwari, the wife of Mua Charan Pattuk, left her husband's house at night, taking with her a daughter of six or seven years old and a son still younger. She went to the house of a cousin of hers, who lived in a house in the same homestead with the accused and his younger brother Guru Dass. The same night Parameshwari gave her daughter in marriage to Guru Dass. The leaving of her husband's house with the daughter and the marriage of the latter to Guru Dass, took place in pursuance of a previous arrangement between Parameshwari and the accused. And the marriage was without the sanction or knowledge of the girl's father. It was proved that Parameshwari had subjected to some degree of cruelty at the hands of her husband, but the Court below did not find, nor do we think it could rightly have found, that the cruelty was such as to justify her in leaving her husband's house, even if that fact, had it been proved, could have affected the present charge, which we are inclined to think it could not have done.

There is no question that, by the Hindu Law, a father is the guardian of his children, and is ordinarily entitled to their custody. But it was suggested that, in the case of a very young child, the mother has as good a right to the custody

as the father, and even possibly a better. So that the taking of the child by the mother was not a taking out of the keeping of the lawful guardian within the meaning of section 361 of the Indian Penal Code. And, in support of this, a passage was cited from the work of Dr. G. D. Banerjee on the Law of Marriage and Stridhun, p. 172. But we are unable to find any authority for the proposition that a mother can ever have a right to the custody of her legitimate children adverse to the father. And such a view seems to us inconsistent with the principles governing the Hindu Law in such matters. Of course, under any ordinary circumstances, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the rights of the father as guardian, and not as a taking out of his keeping. But the present case is very peculiar. The mother removed the girl from the father's house for the express purpose of marrying her without his consent, and thereby depriving him for ever of her guardianship and custody. This did, we think, amount to a taking out of the keeping of the lawful guardian. The conviction is, therefore, right.

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PARAMESH-
WARI SURMA
v.
EMPRESS.
Judgment.

[CRIMINAL APPELLATE JURISDICTION.]

1882
May 9th.No. 63 of
1882.

PROTAP CHUNDER MUKERJI . . . APPELLANT ;.

AND

EMPRESS RESPONDENT.

Criminal appeal—Duty of Court trying criminal appeal—Evidence.

Per WHITE, J.—The sound rule to apply in trying a criminal appeal, where questions of fact are in issue, is to consider whether the conviction is right, and, in this respect, a criminal appeal differs from a civil one. In the latter case, the Court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong.

APPFAL from a conviction by the Additional Judge of Burdwan.

M. Ghose, for the Appellant.

The *Deputy Legal Remembrancer*, for the Crown.

The material portion of the judgment of the High Court (1) was as follows :—

WHITE, J. *WHITE, J.*—This case comes before me in consequence of a difference of opinion between my brothers MITTER and MACLEAN, one of those learned Judges being in favour of affirming the conviction, and the other in favour of setting it aside, and acquitting the prisoner.

The prisoner is a revenue-agent or mukhtar practising in the Collectorate Courts at Bankoora.

The four offences—two being criminal breach of trust, and two being forgery, of which the prisoner has been found guilty by the Court of first instance—arise out of two transactions in which he was concerned with three ryots named Koylash, Tarachand, and Bojdyanath.

The prosecution also charges that, on the 19th of August last, the prisoner received from Tarachand Paramanick Rs. 4 for

the purpose of paying it into the Government Treasury; that he paid only Rs. 2, dishonestly retained the balance, and handed to Koylash a receipted chalan for Rs. 4, in which he had altered the figure 2 into the figure 4.

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 v.
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Judgment

WHITE, J.

The prosecution also charges that, on the same day, the prisoner received from Boidyanath a sum of Rs. 4-13 annas for a similar purpose; that he paid only Rs. 2 into the Government Treasury, dishonestly retained the balance, and handed to the ryot a receipted chalan for Rs. 4-13 annas, in which the figure 2 had also been altered into the figure 4.

The two receipted chalans are produced, and in each the alteration in the figure is obvious.

Koylash and Tarachand are nephew and uncle. Koylash is also the son of one Soorja Paramanick, deceased, who had received a notice in his lifetime to repay Rs. 4 at the Collectorate of Bankoora in respect of certain advances for rice which had been supplied by Government during the famine. Boidyanath is a friend and neighbour of Koylash and Tarachand, and he also had received a notice in the name of his deceased father to repay Rs. 4-13 annas at the same place, and on the same account.

The ryots live about 10 miles distant from Bankoora. Their story is, that Koylash and his uncle Tarachand, on the 10th of August, went to the Bankoora Collectorate for the purpose of paying the Rs. 4 mentioned in the notice addressed to Soorja; that, on their arrival at the Collectorate, Tarachand saw a man with a pen in his ear whom he judged to be a mukhtar, and who was not previously known to either himself or his nephew, but whom he identifies as the prisoner; that they showed the notice to the prisoner who read it, and said that they had Rs. 4 to pay; that Tarachand then gave him Rs. 4. The prisoner went away in the direction of the Treasury, returned again shortly afterwards, and delivered to Koylash a receipted chalan with a figure 2 altered to 4. As they were returning home, they met Boidyanath on the road, journeying to Bankoora on the same errand which had taken themselves there. He induced them to turn back and accompany him to the Collectorate. When they reached their

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WHITE, J.

destination, the prisoner was also there, and Tarachand, pointing him out to Boidyanath, told the latter that he had employed that mukhtar to do the business for himself, and recommended Boidyanath also to employ him. Boidyanath then showed the prisoner the notice addressed to his father, and handed to him Rs. 4-13. It was late in the afternoon when this was done. The prisoner took the money and went away, but soon returned saying that the Treasury was closed, and the money, therefore, could not be paid into the Treasury then, which appears to have been true, and that they must come back on the morrow for the receipt. The ryots accordingly went away, and on the following day returned, when a receipted chalan was, after some delay, delivered by the prisoner to Boidyanath in which the altered figure appeared. The ryots are unable to read or write. They all then left and returned to their villages.

The course of business in paying money into the Treasury, as regards the advances and giving receipts for their payment, was this: Before taking the money to the Treasury, it was necessary to go to a mohurrir named Nilkant, who is in charge of this department, and who is a witness in this case, and get from him the necessary information for filling up 3 chalans in triplicate. This information was supplied by Nilkant from a register of the advances which he kept. The chalans, which are blank printed forms, are then filled up and initialled by Nilkant. This being done, the chalans in triplicate are taken with the money to the Treasury. The accountants then examine the chalans; and, if they find the amount tendered is the same as that named in the chalans, the accountants receive the money and initial the chalans. One of the triplicates remains with the Treasury, another is taken to and kept by Nilkant, and the third is handed to the ryot, and constitutes his receipt for the money which he has paid.

Before weighing the evidence of the ryot, witnesses, I will consider what appears upon the two statements of the prisoner made before the committing Magistrate and the Sessions Court. A comparison of them with the narrative of the ryots will show the points of difference between the prosecutions and the defence as regards the facts of the case.

The prisoner, in his two statements, admits that he filled up both the chalans in triplicate at Nilkant's office, but says that he was employed, not by the ryots, but by Nilkant, who had sent for him, and that he filled up the chalans from the dictation of Nilkant. He states that, when the chalans passed out of his possession, they were each triplicate filled up with the proper figures Rs. 2 and Rs. 2-13 annas respectively. He denies that he delivered either of the receipted chalans to the ryots, or that he altered the abovementioned figures to Rs. 4 and Rs. 4-13 annas, or was aware that the alteration was made. He admits that he paid Rs 2 and Rs. 2-13 into the Treasury on the two occasions mentioned, but says that he received those sums respectively from Nilkant, and not from the ryots, and he denies that any of the ryots ever handed to him any money. He admits that he was aware for whom and on whose behalf he was writing out these chalans, and that it was on behalf of the ryots who have given their evidence. No question, therefore, arises here of disputed identity either as to Protap being the man who was, to a certain extent by his own admission, concerned in the transactions or as to the ryots being the persons who had that transaction. The prisoner also admits that he received from the ryots 4 annas as his remuneration in respect of each transaction.

The prisoner states also, though not from his own knowledge, that Nilkant received the Rs. 4 and Rs 4-13 from the ryots.

The prisoner's defence, therefore, is, that, although concerned in the two transactions to a certain extent, he was only concerned so far as an honest man might be concerned, and that he was an innocent tool employed by Nilkant for the purpose of carrying out the knaveries of the latter.

Both the assessors in the first Court and all the judicial minds which applied themselves to this case are agreed in finding that the ryots were cheated out of Rs. 4. I see no reason to differ from that finding.

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WHITE, J.

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—
Judgment.
—
WHITE, J.

A comparison of the prisoner's statements with those of the ryots shows that the material facts in which they differ, and which the prosecution has to prove, are—

(1) Did the prisoner receive Rs. 4 and Rs. 4-13 from the respective ryots?

(2) Did he hand to them the receipted chalans with the altered figures in them?

(3) Did he make the alteration?

(The learned Judge then dealt with the evidence, and proceeded as follows):—

I have alluded with greater particularity to the evidence for the defence than I think it deserves, because the learned Judge of this Court, who is in favour of an acquittal, stated to me that one of his reasons was, that, in his opinion, the evidence for the defence is quite as trustworthy as the evidence for the prosecution. Since becoming aware of that opinion, I have again gone through the evidence to see if I could agree with it, but find myself unable to do so.

On the whole I have come to the conclusion that the three ryots are trustworthy witnesses, and that the story which they tell as to the two transactions which they had with the prisoner is true. Upon such evidence as is before me in this case, I could not come to a contrary conclusion without throwing over and discrediting the whole of their testimony for the single reason that Nilkant is shown to have done that in the first instance which enable the fraud to be perpetrated, and that Nilkant's act makes it probable, that, if he had profited by the fraud, he would try to screen himself by instigating the defrauded parties to bring a false charge against an innocent person.

To disbelieve the three ryots on such grounds as these would be, in my opinion, to disregard all the ordinary rules which govern Courts of Justice in weighing and appreciating human testimony. I admit that the sound rule to apply in trying a criminal appeal, where questions of disputed fact are in issue, is to consider whether the conviction is right, and that, in this respect, a criminal appeal differs from a civil one. There the Court must be convinced before reversing a finding of fact by

a lower Court that the finding is wrong. Applying what I hold to be the sound rule in a case like the present, I am of opinion, so far as the facts are concerned, that the conviction is right, and ought to be upheld.

I would, therefore, affirm the conviction, and dismiss the appeal. .

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PROTAP
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—
Judgment.
—
WHITE, J.

[CRIMINAL JURISDICTION.]

1882
May 22nd.
—
No. 102 of
1882.

IN THE MATTER OF JADUNATH HAZRA . . . APPELLANT;
AND
ANNODA PROSAD SIRCAR RESPONDENT.

Sanction to prosecute.

On an application to a Moonsiff for sanction to prosecute, the following order was made upon the petition: "If the petitioner thinks there is sufficient evidence against A, I have no objection to give such sanction."

Held that the order was not a sufficient sanction to support a prosecution.

REFERENCE submitted under section 296 of the Criminal Procedure Code, Act X. of 1872, by the Officiating Sessions Judge of Hooghly.

The terms of the Reference were as follow :—

It appears that one Annoda Prosad Sircar was charged before the Deputy Magistrate of Mohesorekha with an offence under section 207, Criminal Procedure Code. The Deputy Magistrate heard all the evidence, and apparently arrived at an opinion that the accused was guilty, and then suddenly turned round and acquitted him on the ground that no proper sanction was given. I must say I am somewhat at a loss to understand why the Deputy Magistrate should consider the sanction insufficient. The sanction is in these words: "If the petitioner thinks there is sufficient evidence against Annoda Prosad Sircar, I have no objection to give same sanction asked for herein." The Moonsiff, who wrote this, evidently does not write English very correctly, but I think his plain meaning was, that he thought there was a case for enquiry, that he was willing to sanction an enquiry, though he may here, perhaps, at the same time, have suggested a doubt whether the prosecution was likely to lead to much practical good. Still it seems to me that

it was a distinct, and, as far as I see, a sufficient sanction. The rulings referred to by the Deputy Magistrate do not seem to me to the point. The facts of the case of *Mahima Chandra Chuckerbutty*, 7 B. L. R. 26, were very different. There a sanction had been given for the prosecution of two persons, and a further application was made for sanction to include a third person in the prosecution. Instead of this being done, the Collector simply restricted the previous sanction which extended, as there said, to two persons only, and no sanction had, therefore, ever been given for the prosecution of the third person at all; in the present case, however, a distinct sanction was given for the prosecution of Annoda Sircar. In the case of *Empress vs. Sabsukh*, I. L. R., 2 All. 533, the only point I can find applicable to the present case are the concluding remarks of Mr. Justice STRAIGHT, which seem, however, more applicable to the judgment of the Deputy Magistrate than the facts of the case.

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I think, therefore, the Deputy Magistrate is wrong in holding that there was no proper sanction for the prosecution of Annoda Sircar, and his acquittal of the prisoner leads to the lamentable result that, although Annoda has been found to be guilty, he is allowed to slip through the hands of justice on a mere technicality. The fact that he has acquitted the prisoner, instead of simply discharging him, seems to present some difficulty in the way of amending his order. I think, however, that the papers should be laid before the High Court for such orders as the Honourable Court may think proper to pass.

The following order was made by the High Court(1):—

We are of opinion that the so-called sanction was not sufficient to support the prosecution. We, therefore, decline to interfere.

(1) PRINSEP and O'KINEALY, JJ.

[CRIMINAL JURISDICTION.]

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May 22nd.

No. 104 of
1882.

IN THE MATTER OF EMPRESS APPELLANT;
AND
ALIM MUNDLE AND OTHERS RESPONDENTS.

*Commitment without Jurisdiction—Competent Court—Procedure—
Criminal Procedure Code (Act X. of 1872), section 147.*

Where a Magistrate without jurisdiction commit an accused person to the Sessions Court, such commitment is void, and no reference to the High Court is necessary to have it set aside.

REFERENCE submitted by the District Judge of Mymensingh under section 296 of Act X. of 1872.

The circumstances under which the reference was made were thus stated by the Sessions Judge:—

"It appears that, out of the seven men sent up, four are residents of the Sylhet District, namely, Alim Mundle, Alim Munshi, Samir Mirshikari, and Banu Hajam. Their offences also on the evidence before me, and as stated by the Police and Government Pleader, have been committed in the District of Sylhet, and are of such a nature that this Court can in no way take cognizance of them. Nothing connected with them has taken place in this District.

"For this reason, this Court is without jurisdiction as regards those four men, and the Deputy Magistrate of Netrokona was also without jurisdiction to enquire into their offences.

"The commitment of these men to this Court under sections 231 and 232 and (as regards Banu) section 235 of the Indian Penal Code will, therefore, be sent to the High Court in order that it may be set aside, and the Sylhet authorities may be directed to deal with those offences."

The judgment of the High Court (1) was as follows :—

This is, in our opinion, essentially a matter on which the explanation of the Magistrate should have been obtained, and submitted to us with any report from the Sessions Judge.

If the Sessions Judge finds on the record of the enquiry held by the Magistrate that the Magistrate had no jurisdiction to take any proceedings against some of the accused, there is no commitment before the Sessions Judge so far as they are concerned, and no orders from the High Court are necessary. The Magistrate would not be a competent Magistrate within the terms of the Explanation to section 197 of the Code of Criminal Procedure. If the commitment is not valid, the accused should be sent to the District Magistrate to be dealt with in accordance with law.

Let the record be returned for the orders of the Sessions Judge.

(1) PRINSEP and O'KINEALY, JJ.

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—

[CRIMINAL JURISDICTION.]

1882
July 13th.
No. 9 of
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IN THE MATTER OF DHUNNU KAZEE
AND
KHORSHED KAZEE } ... PETITIONERS.

Criminal Procedure Code (Act X. of 1872), section 263—Verdict of Jury—Fury, Verdict of, whether against weight of evidence—Duty of Court under section 263 of Act X. of 1872—Weight of evidence—Fury, When Court may interrogate—Fraudulent use of forged document—Forged document when used fraudulently.

In a reference under section 263 of the Criminal Procedure (Act X. of 1872), on the ground that the verdict of acquittal by a jury is against the weight of evidence, it is necessary for the High Court to consider merely, having regard to the circumstances which the prosecution were bound to prove, whether, on the evidence, the verdict was such as reasonable men ought to have come to.

Under section 263, the Court is authorized to put to a jury such questions only as are necessary to ascertain what their verdict is. Accordingly, where a jury returns a plain simple verdict of "not guilty," whether that verdict be erroneous or not, it is the duty of the Court to receive and record it without asking any questions about it.

Although a person's title to property may be ever so good, yet, if, in the course of an action brought against him to obtain possession of the property, he uses, by way of supporting his title, though there be no necessity for doing so, a forged document, he uses that document fraudulently.

REFERENCE submitted by the Officiating Sessions Judge of Burdwan to set aside the verdict of a jury on the ground that it was against the weight of evidence.

The accused were tried, one under section 471, and the other under sections 471, of the Penal Code. The jury return-

ed a verdict of "not guilty." The evidence will be found in the judgment of the High Court on the Reference.

Baboo *Umbica Churn Bose*, for the Accused.

Baboo *Ram Churn Mitter*, for the Crown.

The judgment of the High Court (1) was delivered by

NORRIS, J.—In this case the accused Dhunnu was charged under section 471 of the Penal Code, with having, on or about the 1st February 1879, at the Jehanabad Moonsiff's Court, fraudulently and dishonestly used as genuine a certain document dated 12th Falgoun 1260, knowing or having reason to believe the same to be a forged document, and the accused Khorshed Kazee was charged under sections 471 of the Penal Code with abetting the fraudulent and dishonest use of the forged document, knowing or having reason to believe that the same was forged. The jury unanimously acquitted the accused. The Officiating Sessions Judge of Burdwan, before whom the accused were tried, disagreeing with the verdict of acquittal, has submitted the case to the High Court under the provisions of section 263 of the Criminal Procedure Code.

In arriving at a conclusion as to what principles should guide me in the exercise of the discretion given me by section 263 of the Criminal Procedure Code, I am not left without authority. In *The Empress vs. Makhun Kumar*, 1 Cal. L. R. 275, at p. 281, GARTH, C.J., says: "With regard to the first of these questions" (i.e., how far the High Court is justified, in a case referred under section 263 of the Criminal Procedure Code, in convicting the accused contrary to the express and unexplained finding of a jury), "it appears to me that, by that section, the Legislature intended to vest in the High Court a very large discretion, and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled; the verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried, and of hearing the witnesses examined" (and, what is more important, cross-examined), "ought always, in my opinion, to command its

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proper weight, and the more unanimous their verdict may be; and the less likely to have been influenced by prejudice or error, the more entitled it should be to our respect and consideration; but there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as, for instance, where, out of a jury of five, three are of one way of thinking and two of another, and the presiding Judges agree with the minority, or where it is manifest from the conduct of the jury or otherwise that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment. In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with MACPIERSON and MORRIS, JJ., in 25 W. R., Cr. Rul., 77, that 'the verdict of a jury should not be interfered with' except where there is a gross and unmistakable miscarriage of justice; nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence without giving the verdict of the jury its proper weight. Each case, in my view of the section, should depend upon its own circumstances."

In *Reg. vs. Khanderav Bajirav*, I. L. R., 1 Bom. 10, WEST, J., says: "The section we have quoted" (*i.e.*, section 263, Criminal Procedure Code) "lays down that the Court may acquit or convict without reference to the charges made against the accused; in other words, the functions both of the Judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England. Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided as far as may be by the analogies of the English Law. It is a well-recognized principle that the Courts in England will not set aside the verdict of a jury unless it be perverse and patently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers, *first*, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned

by the Legislature; and, *secondly*, because any undue interference may tend to diminish the sense of responsibility which it is desirable that a jury should cherish. We think, however, that, by our rectifying a jury's verdict in a proper case, we shall increase, not diminish, that sense of responsibility."

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The principles which guide the English Courts in deciding whether a new trial should be granted upon the ground that the verdict was against the weight of evidence were discussed in the recent case of *Solomon vs. Bitton*, 1 R., 8 Q. B. D. 176, where the Court of Appeal said: "The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence ought not to depend on the question whether the learned Judge, who tried the action, was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to."

The Judge, in his report referring the case to us, makes no complaint of the conduct of the jury on the ground of prejudice; he complains only that the verdict was against the weight of evidence, and he seeks to substantiate that complaint by calling attention to the answers given by the jury to certain questions put to them by him after they had returned their verdict. I shall presently refer to these answers.

Endeavouring to guide myself by the light of the principles laid down in the decisions I have quoted, I have to ask myself "Is this verdict, which is sought to be set aside, such as reasonable men ought to have come to?" In order to answer this question, it is necessary to consider what the prosecution were bound to prove against the accused in order to justify a conviction. It was incumbent upon the prosecutor to prove (1) that the document alleged to have been used by the accused was, in fact, a forged document; (2) that it was used by the accused; (3) that, at the time it was used by the accused, they knew or had reason to believe that it was a forgery; (4) that, at the time they used it, knowing or having reason to believe that it was a forgery, they did so fraudulently or dishonestly. If any one of these points was left in doubt, the jury were bound

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to acquit. A verdict of acquittal would be "such as reasonable men ought to have come to."

The document which was alleged to have been a forgery was a hiba-bil-ewaz or deed of gift purporting to have been executed in favour of the accused by their father, Sudderuddin Kazee, and to have been registered by one Golam Russool, Kazee of Jchanabad, on the 14th April 1854. Sudderuddin Kazee died some 10 or 12 years since, leaving the two accused, a daughter, and a widow, the mother of his three children, him surviving. If the hiba was genuine, the widow and daughter were disinherited; if it was a forgery, the daughter became entitled to one-fifth of seven-eighths of her father's property upon his death.

The daughter, after her father's death, married one Aminuddin Kazee. The prosecutor alleged that both the father's execution of, and the Kazee's certificate of registration endorsed on, the hiba-bil-ewaz were forgeries, but they did not charge either of the prisoners with the actual forgery. Nothing worthy of the name of evidence was forthcoming at the trial to prove that the father's signature was a forgery, and practically that point was abandoned by the prosecutor. On the other hand, there was an overwhelming body of evidence proving beyond all doubt that Golam Russool's certificate of registration was a forgery, and I am abundantly satisfied that it was a forgery. Thus the first point necessary for the prosecutor to establish was established. The use of the hiba by the accused was also proved by their own admissions. Point the second has thus been established.

In order to establish the third point, which, for brevity, I will call a guilty knowledge on the part of the prisoners, the prosecution sought to prove, that after Sudderuddin's death, his widow lived in commensality with the accused; that the daughter enjoyed the property equally with them; that Aminuddin had tried to sell his wife's share to the accused; that not only did they not mention the hiba, but carried on negotiations for the purchase, which only fell through by reason of the accused not offering a sufficient sum; that the accused, after the negotiations with Aminuddin had fallen through, knowing that he was treating for a sale to one Sheikh Budruddin,

allowed the treaty to continue, and said nothing about the hiba; that, after the sale to Budruddin had taken place, when he went to take possession, Dhunnu Kazee told him that his (Dhunnu's) brother was in Calcutta, and would not return for 15 days, when possession should be given, that, after the expiration of 15 days, Dhunnu told him that he would not give up possession; that, when Budruddin saw the accused and their sister in the Moonsiff's Court, the accused, instead of producing the hiba at once, asked for 15 days' time to put in their written statement, and, at the expiration of that period, asked for another adjournment, and subsequently for a third, and that it was not until after the third adjournment that the hiba was filed in the Moonsiff's Court. If these facts or the more important of them had been proved, I should have been of opinion that the jury, "as reasonable men, ought to have come to the conclusion" that a guilty knowledge on the part of the accused was established. But I am by no means satisfied that these facts or the more important of them were proved. They rested upon the testimony of Budruddin and Aminuddin. The former admitted that he had been imprisoned for three months for being in possession of stolen property; that he was on bad terms with the accused before his purchase from Aminuddin; that he had charged 'Khorshed with stealing a goat, which charge was dismissed; that, since then, he had twenty or twenty-five civil suits with them. He also stated that Aminuddin was on bad terms with the accused. It is true that he says he still eats at the houses of the accused, but as I understand, it is only in cases of the most bitter hatred that one Mahomedan will refuse to eat salt with another. Upon these admissions, I am not satisfied with the truth of this witness's evidence. Aminuddin admits that he has had a suit with the accused, and that he is on bad terms with them, and that Budruddin used to assist him in his litigation with the accused; and though he says that three or four persons were present when he tried to sell the property to the accused, he cannot remember their names. I am not satisfied as to the truth of this witness's evidence. I am of opinion that the prosecution failed to prove a guilty knowledge on the part of the accused; and, if I can see my way to this conclusion, how much

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more probable is it that the jury, who had a full opportunity of judging of the credibility of the witnesses by observing their demeanour in the witness-box, and how they went through their cross-examination, may have come to the same conclusion. It may, no doubt, be said that the jury have not expressed any opinion upon the evidence of Budruddin and Aminuddin. It is sufficient to say in reply that their opinion was not asked, and as they found a general verdict of "not guilty," I have a right to assume that this estimate of the evidence corresponds with the one I have formed.

This finding disposes of the case. I think it right, however, to deal with an argument that was advanced on behalf of the accused at the hearing before us. It was urged thus: "The accused had a good defence to Budruddin's action without having recourse to the hiba. That being so, even assuming that the hiba was forged, and used by the accused with a guilty knowledge, yet, as there was no legal necessity for their using it, they cannot be said to have used it fraudulently or dishonestly." I am clearly of opinion that the use of the hiba, under such circumstances, was "fraudulent." The word "fraudulently" is defined by section 25 of the Penal Code thus: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." It is to be observed that this definition of "fraudulently" differs entirely from that of "dishonestly" as given in section 24. To do a thing dishonestly, there must be the intention of causing wrongful gain to one person or wrongful loss to another; and "wrongful gain" is defined to be "gain by unlawful means" of property to which the person gaining is not legally entitled, and "wrongful loss" as the loss by unlawful means of property to which the person losing it is legally entitled." A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction. MAULE, J., says in *Reg. vs. Nash*, 2 Denn. C. C. R. 500: "There may be an intent to defraud without the power or the opportunity to defraud;" and at p 503, "It is not necessary that any person should be in a situation to be defrauded. I am further of opinion that, in such a case as

was put in argument before us, the intent to defraud the party to whom the document was altered (in this case Budruddin) was a necessary inference which the jury ought to have been directed to draw." (*Reg. vs. Hill*, 8 C. and P. 274; *Reg. vs. Cook*, 8 C. and P. 582.) Let a person's title to property be ever so good, yet, if, in the course of an action brought against him to gain possession of the property, he uses, by way of supporting his title, though there may be no necessity for the use of it, a forged document such as this *hiba*, I am clearly of opinion that he uses it fraudulently.

It now only remains for me to notice the answers of the jury to certain questions put to them by the Judge after they had delivered their verdict. In reply to questions from the Court, the jury stated as the reasons for their verdict: "There is no proof to show when the registration-certificate was forged, *i. e.*, whether before or after the document A (the *hiba*) was filed in the Moonsiff's Court. There is also no proof as to who forged the registration-certificates, *i. e.*, whether forged by the father of the accused, or by the accused themselves, and, in the former case, that the accused knew they were forged." "They find that the registration-certificate is a forgery, but not the executant's signature on the document."

It was urged by the learned pleader who appeared for the Crown that these answers showed that the jury had come to very foolish conclusions upon the evidence, and that, in receiving their verdict, he ought to proceed upon the assumption that these foolish conclusions, and these alone, had induced them to return a verdict of acquittal. It may be that the conclusions are foolish, but I refuse to consider these answers at all, because I am of opinion that the Judge had no right to put the questions which called forth the answers. The Court is authorized by section 263 to ask the jury such questions as are necessary to ascertain what their verdict is. In this case the jury had returned a plain simple verdict of "not guilty;" it may have been erroneous, but it certainly was not ambiguous, and the duty of the Judge was to receive it, and record it without asking any questions about it.

For the reasons given above, I am of opinion that the verdict of acquittal should stand.

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[CRIMINAL JURISDICTION.]

1882
April 20th.
—
No. 75 of
1882.

IN THE MATTER OF GÖPAL CHUNDER SIRDAR . PETITIONER.

*Abetment of extortion—Illegal omission—Penal Code (Act XLV. of 1860),
section 107.*

A having been found guilty of extortion in having taken Rs. 15 from a woman by threatening to bring a charge of theft against her, the petitioner, who was the village chowkidar, was found to have stood by during the occurrence, and not to have disapproved of A's conduct, and was convicted of abetment of extortion by the Deputy Magistrate.

Held that there had been no illegal omission on the part of the petitioner, and therefore the conviction was bad.

MOTION to set aside a conviction and sentence passed by the Deputy Magistrate of Diamond Harbour in the '24-Pergunnahs dated the 7th March 1882.

Baboo *Baidonath Dutt*, for the Petitioner.

The facts are set out in the judgment of the High Court (1), which was as follows :—

In this case one Shab Chand Bhandari was charged with extortion, the extortion being said to consist in taking Rs. 15 from a woman by threatening to bring a charge of theft against her.

The petitioner before us, Gopal Chunder Sirdar, was the village chowkidar, and he has been convicted of abetment of the extortion committed by Shab Chand Bhandari.

The Deputy Magistrate says in his judgment: "Though it does not appear that he (Gopal Chunder Sirdar) said or did anything in particular, his presence during the occurrence added to the fact of his not having disapproved of the accused Shab Chand's words and conduct and action, sufficiently indicate abetment on his part."

We think that the omission on the part of Gopal Chunder Sirdar to disapprove the conduct of Shab Chand Bhandari cannot, under the circumstances, be said to amount to abetment. The only portion of the definition in section 107 of the Penal Code which can be supposed to apply is the third clause, *vis.*, "intentionally aids, by any act or illegal omission, the doing of that thing." Now there was no illegal omission on the part of the chowkidar in this case. He was not bound by section 89 or by section 90 of the Code of Criminal Procedure to report the offence of extortion; and, even if he were so bound, his subsequent omission to report the commission of the offence could not be said to be intentionally aiding the doing of the thing itself, which must have been done before it could be reported by the chowkidar.

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The offence of extortion is not a "cognizable offence," and therefore, even if we suppose that the chowkidar knew the charge of theft to be false, and this does not appear, section 95 or section 97 of the Code of Criminal Procedure would not apply. •

That the chowkidar intentionally aided the commission of the offence of extortion by any act is negatived by the Magistrate's finding; and we are unable to see that he aided by any illegal omission. We must, therefore, set aside the conviction and sentence.

[CRIMINAL JURISDICTION.]

1882
[May 22nd.] IN THE MATTER OF KALI CHURN } . . . PETITIONERS.
MOOKERJEE AND OTHERS . . . }

No. 118 of
1882.

Private defence—Plea—Acquittal—Evidence Act (I. of 1872), section 105.

Where the accused had been convicted of riot under section 148, and of grievous hurt under section 325, of the Penal Code, the Sessions Judge on appeal held that the complainants had themselves been the aggressors, and that the accused had merely exercised the right of private defence; but, inasmuch as they had not set up the plea of private defence, he considered it was not competent to him to set aside the conviction.

Held that, on the finding of the Sessions Judge, the accused were entitled to an acquittal.

MOTION to set aside a conviction and sentence passed by the Deputy Magistrate of Moheshpore.

Baboo Amarendra Nath Chatterjee, for the Petitioners.

Baboo Ram Churn Mitter, *contra*.

The facts are stated in the judgment of the High Court (1), which was as follows:—

The petitioners have been convicted of riot being armed with dangerous weapons under section 148, and of grievous hurt under section 325, by the Deputy Magistrate of Moheshpore. On appeal the sentences were reduced, and the Sessions Judge made the following observations: "I am, however, satisfied on the documentary evidence that the land in dispute was let, in the first instance, to the lessor of the complainant in the counter-case, and that the party of the present complainant

was the attacking party. That being so, I think the sentences that have been passed are excessive. No doubt, not having set up the plea of private defence of property in the lower Court, he cannot in appeal rely on that plea to the extent of claiming an acquittal, but it is, I think, a circumstance to which weight should be given in estimating the proper punishment to be inflicted.

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From this we understand the Sessions Judge to be of opinion that, had the appellants before him been in a position to claim an acquittal on the ground that they had not been properly convicted, because, on the evidence on the record, they had committed no offence, he would have acquitted them, but, inasmuch as, by not raising before the Magistrate the plea that they were acting merely in exercise of the right of private defence, he could not consider the point except in mitigation of the sentences passed. Such an argument is clearly untenable. If the plea could be entertained at all, it could be maintained to the fullest extent. The Sessions Judge has, in effect, held that, on account of a technicality which is altogether without any force, the appellants before him were unable to contend that they had not committed the offence of rioting, but that, although they were not guilty, still, in consequence of the omission to plead this before the Magistrate, they could not claim absolute exemption from punishment.

It is true that section 105 of the Evidence Act placed on the accused the burden of proving that, in any criminal trial, they acted within their legal rights in the exercise of the right of private defence of property, still this burden can be discharged by the evidence of witnesses for the prosecution as well as by evidence for the defence on such a plea being set up; and the accused are clearly entitled to claim an acquittal if, on the evidence for the prosecution, it is shown that they have committed no offence.

Further we would observe that, if the evidence for the prosecution did establish this, the charge on which the accused were tried was incorrect, for applying illustration (2), section 439 of the Code of Criminal Procedure, to the present case, the charge of rioting is equivalent to a statement that the act of

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C. L. R. 97.

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the accused fell within the definitions of rioting given in sections 146 and 148 of the Penal Code; that it did not fall within any of the general exceptions of the Penal Code; &c. But, if the evidence showed that it did fall within one of the general exceptions, *vis.*, that relating to the exercise of the right of private defence of property, the charge was unsustainable.

We have some doubt whether we ought to remand this case for a re-trial of the appeal by the Sessions Judge, but, having regard to the terms of the judgment already quoted, we think that we may accept it as a finding that the appellants were acting in the legal exercise of their right of private defence of property; and, as they are consequently not guilty of the offences for which they have been committed, they must be acquitted.

Orders should issue for their immediate release.

[CRIMINAL JURISDICTION.]

. IN THE MATTER OF ISSUR CHUNDER NATH

AND

KALI CHURN NATH AND ANOTHER.

1882
May 15th.No. 99 of
1881.*Criminal Procedure Code (Act X. of 1872), section 521—Court of
Revision—Procedure.*

Where a Magistrate considers that there is no sufficient reason for proceeding under section 521 of the Code of Criminal Procedure, he may let the matter drop, and the High Court will not, as a Court of Revision, interfere with his action.

In the Matter of Sonai Paramanick, 1 C. L. R. 486, followed.

THIS was a Reference by the Officiating Sessions Judge of Mymensingh for the opinion of the High Court under the circumstances stated by him in the following report :—

“A complaint was laid before the Magistrate that one Kali Churn Nath and others had closed a public road used by men and cattle. After taking a report from the Police, the Magistrate issued an order to the accused to open the road, or show cause to the contrary under section 521 of the Criminal Procedure Code.

“Kali Churn Nath appeared and showed cause on the 24th March, and, three days later, Ramananda Adhikari, who was one of those against whom notice had issued, appeared and claimed a jury under section 523. These two persons' interests appeared to be opposed. They made contradictory allegations, each charging the other with obstructing the road.

“On the 31st March, the Magistrate appointed a jury, but, on the petition made next day by Kali Churn, he cancelled the order, as he considered the case was not one for the application of the provisions of section 521, the two defendants having conflicting interests, and he, therefore, referred the complaint to the Civil Court.

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"Kali Churn's objection is, that the matter has been already decided in his favour by a decree of the Moonsiff's Court, which would show that the road was not a public one. That decree is one under section 9 of Act I. of 1877.

"I think the order for a jury ought to have been allowed to stand, because it would have been for the jurors to decide how far Kali Churn was protected by his decree. If things are allowed to remain as they are, complainant will have no remedy, for a civil suit will not lie for obstruction to a public road. Besides I do not think the contradictory allegations of the opposite party can affect complainant's position. If the jury decide in his favour, he can force either or both of them, if necessary, to remove the obstruction.

"For the above reasons, I think the order cancelling the order for a jury should be set aside, and the jury directed to proceed with their deliberation."

The order of the High Court (1) was as follows :—

We see no reason to interfere. We agree with the judgment of another Division Court in the case of *Sonai Paramanick*, 1 C. L. R. 486, that the Magistrate, having satisfied himself (as in the case now before us) under section 521, was at liberty to let the matter drop.

(1) PRINSEP and O'KINEALY, JJ.

[CRIMINAL JURISDICTION.]

LUDDUN SAHEBA APPELLANT;
 AND
 MIRZA KAMAR KUDAR. RESPONDENT.

1882
 April 24th.
 No. 93 of
 1882.

Criminal Procedure Code (Act X. of 1872), section 536—Moota marriage under Shia Law—Maintenance of Shia wife by moota marriage.

Although a Shia wife by *moota* marriage is not entitled by the Shia Law to maintenance, such a wife is entitled to maintenance under the provisions of section 536 of the Criminal Procedure Code, Act X. of 1872.

Where a Shia husband gives up the unexpired portion of the term fixed by a *moota* marriage, he does not thereby terminate the relationship of husband and wife.

MOTION to set aside an order passed by the Deputy Magistrate of Alipore, 24-Pergunnahs.

The petitioner in this case made an application, under section 536 of the Code of Criminal Procedure, for the purpose of obtaining an order for maintenance of herself as the wife of Prince Mirza Kamar Kudar. It was admitted on all hands that the parties were Shias, and that she was a wife by the *moota* form of marriage contract. She alleged that the period of the contract made between herself and the defendant was 50 years. The defendant, on the other hand, alleged that the period was one month and a half only.

The Deputy Magistrate, before whom the case came for disposal, was of opinion, first, that, inasmuch as, under the Shia Law, a *moota* wife has no right to maintenance, the petitioner was not entitled to obtain an order for maintenance under the provisions of section 536 of the Code of Criminal Procedure; and, secondly, that, as the defendant had given up the remaining term of the period of the *moota* marriage, the petitioner was no longer a wife within the meaning of section 536.

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LUDDUN
SAHEBA

v.

MIRZA
KAMAR
KUDAR.

Ameer Ali and *Moonshee Serajul Islam*, for the Petitioner
Abdul Rahman, *contra*.

Argument.
—

Ameer Ali.—The Deputy Magistrate has dismissed the petitioner's application on two grounds:—(1) because, under the Shia Law, a *moota* wife is not entitled to maintenance; and (2) on the ground of the alleged divorce by the husband. He is in error on both points. It is true that, under the Shia Law, a woman married by the *moota* form is not entitled to maintenance, but the petitioner does not claim maintenance under the Shia Law; her claim is based upon her statutory right to maintenance under section 536 of Act X. of 1872, the Criminal Procedure Code. Is a woman married by the *moota* form a wife or not? In order to determine this point, we have to refer to the personal law of the parties. The Shia Law recognizes such a connection as a lawful marriage; the offspring of the union are regarded as legitimate, and are entitled to inherit from their parents (*Sharaya-ul-Islam*, p. 279; 1 Querry, p. 689). There can be no question, therefore, that the petitioner is a wife within the meaning of the section, and entitled to maintenance. As regards the second point, the Deputy Magistrate has misread the Shia Law. He has understood *sihar* to mean repudiation, but see Baillie's *Imamiya Law*, p. 43, and 1 Querry, p. 694, for the true meaning of the word. The "giving away" of the term of *moota* (the period for which the marriage is contracted) does not mean *talak* (*Sharaya-ul-Islam*, p. 28); it is equivalent to *khula*. *Khula* can only take place with the consent of the wife. The husband can make a "gift" or *heba* of the period of *moota* with the consent of the wife; for no gift is valid without acceptance. If it be held that the husband can make a "gift of the term" without the consent of the wife, the result would be that he would have the power of *talaking* her, though, under the Shia Law, he has no such power (*Sharaya-ul-Islam*, p. 282). I submit that the case should be sent back to the Deputy Magistrate for a trial of the issue as to the period of the marriage.

Abdur Rahman contended that a *moota* wife is not a wife in the proper sense of the term, and, therefore, the petitioner was not entitled to maintenance under section 536 of Act X. of 1872. In the second place, the husband repudiated her. (FIELD, J.—But, under the Shia Law, he has no power of repudiation.) I submit that he can “give away” the term. (FIELD, J.—But that must be with her consent.) It is done so frequently. The *Ex-King* of Oude has turned out many of his *moota* wives.

The judgment of the High Court (1), after stating the facts as above, was as follows:—

As to the first point, there is no dispute that, according to the Shia Law, a *moota* wife is not entitled to maintenance. But it is contended by Mr. Amir Ali that this provision of the Shia Law cannot interfere with the statutory right to maintenance given by section 536 of the Code of Criminal Procedure.

We think that this contention is correct. A right to maintenance, depending upon the personal law of the individual, is a right capable of being enforced, and properly forms the subject of a suit in a Civil Court. But we think that this right, depending upon the personal law of the individual, is altogether different from the statutory right to maintenance given by section 536 in every case in which a person having sufficient means neglects or refuses to maintain his wife.

As to the second point, it is admitted by both sides that the husband can give up the remaining portion of the period for which the contract of *moota* marriage is made. For the defendant it is contended that the effect of giving up the rest of this period is to put an end to the relationship of husband and wife. No authority has been shown to us in support of this contention, and, as at present advised, we are unable to concur in the argument that the giving-up of the remainder of the term terminates the relationship of husband and wife. According to the Shia Law, the *moota* form of marriage does not admit of repudiation; and, if the giving-up of the remainder of the term had the effect contended for, this would practically

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KUDAR.

—
Judgment.
—

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KAMAR
KUDAR.

Judgment.

destroy the provision of the law which forbids repudiation in this form of marriage.

We think, therefore, that the Deputy Magistrate was not right in dismissing the petition on either of the grounds on which he has proceeded. We must, therefore, set aside his order, and remand the case in order that he may determine whether the period of the *moota* contract was 50 years as alleged by the petitioner, or one month and a half only as alleged by the defendant—determine, in other words, whether the petitioner is still the wife of the defendant.

In the course of the argument a question was raised before us upon which we pronounce no opinion, because it was not a point which was raised before the Deputy Magistrate. We refer to the question whether the form of divorce known as *sihar* may be exercised in the *moota* form of marriage. Mr. Baillie says that there is some difference of opinion on this point, but that, according to the opinion which is founded on traditional authority, it may be exercised. The defendant contended before the Deputy Magistrate that he had given up the remainder of the term, and that this had the effect of terminating the relationship of husband and wife. He made no allegation that he exercised, and had a right to exercise, *sihar*.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF JAMES WOOD . . . PETITIONER ;

AND

THE CORPORATION OF THE TOWN OF
CALCUTTA.1882
May 23rd.
—
No. 112 of
1882.*Act IV. (B. C.) of 1876, section 77—Exercising profession.*

To justify a conviction under section 77 of Act IV. (B. C.) of 1876, for having exercised the profession of a boarding-housekeeper, it is necessary to prove that the accused held himself out to the public as one whose business it was to receive boarders for profit.

In case of conviction, no fine can legally be imposed under the section, except upon evidence as to the amount payable in respect of the license which ought to have been taken out. •

THIS was a motion to set aside a conviction had under section 77 of Act IV. (B. C.) of 1876. The petitioner was found to have exercised the profession of a boarding-housekeeper without having taken out a license, and a fine was imposed upon him.

No evidence was given as to the amount payable in respect of the license which, it was alleged, the petitioner ought to have taken out, but had omitted to take out.

R. W. Mitter, for the Petitioner.

Phillips (Acting Advocate-General), for the Corporation.

[CRIMINAL.]

C. L. R. 98.

1882

In re

JAMES WOOD

v.

THE CORPO-
RATION OF
THE TOWN
OF
CALCUTTA.*Judgment.*

The judgment of the High Court (1) was as follows:—

The petitioner Wood has been convicted under section 77, Act IV. (B. C.) of 1876, the Calcutta Municipal Consolidation Act, of having, during 1881, exercised the profession of boarding-housekeeper without the license required by section 75, and has been fined Rs. 75.

Several objections have been raised before us on the merits of the case, and of these the most important is, whether or not petitioner Wood keeps a boarding-house within the meaning of the Act. The term "boarding-house" is not defined in the law. Looking, however, at the manner in which it is used in Calcutta, we think that, in order to obtain a conviction, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit. In the present case there is evidence on the record sufficient to justify the finding of the lower Court that petitioner Wood kept a boarding-house. Nevertheless the sentence of fine cannot be upheld. The law (section 77) limits the fine in such a case to three times the amount payable in respect of the license which has not been taken out. There is absolutely no evidence on the record to show what is the amount payable on account of the petitioner's license, nor is there any evidence regarding the amount of assessment on petitioner's house or place of business on which any calculation of the amount payable on account of such business could be made.

Under such circumstances we set aside the order passed and direct that the fine, if paid, be refunded. We altogether agree with the remarks of the Magistrate regarding the result of such prosecutions being left in the hands of an inexperienced Municipal officer. Much valuable time has been wasted in this Court on arguments arising from irregularities and omissions, which would not have taken place if the prosecution had been properly conducted, and we consider that the employment of the Advocate-General in this Court to defend the conviction would, in all probability, have been avoided if some legal practitioner, even of the lowest grade, had been retained to appear before the Magistrate.

[CRIMINAL JURISDICTION.]

J. BRADLEY* APPELLANT ;

AND

C. E. JAMESON RESPONDENT.

1882
Mar. 6th.
—
No. 241 of
1882.

*Criminal Procedure Code (Act X. of 1872), section 518—Revival of order after
proceedings being struck off.*

An order having been made under section 518 of the Criminal Procedure Code, Act X. of 1872, was subsequently reviewed by the Magistrate who passed it. On the review, the Magistrate struck off the case, remarking that the order was bad, and referred the matter to his superior officer.

The latter having declined to interfere, stating that he saw nothing illegal in the order, the Magistrate, by an order, revived his former order.

Held that there being no fresh proceeding, the order reviving the other was bad.

REFERENCE submitted by the Officiating Sessions Judge of Sylhet dated the 14th September 1881.

1882

The terms of the Reference were as follow :—

J. BRADLEY

v.
C. E. JAMESON.*Judgment.*

“The facts of the case are that the managers of Phencha Cherra and Kutti Cherra tea estates have established two markets on the same day of the week close to each other. The Phencha Cherra market is the older of the two. The Sub-Divisional Officer of Hylakandi has ordered that the Kutti Cherra manager shall discontinue holding his market on Thursdays until further notice. The reasons which he gives in his order for passing it are as follow: ‘All persons bringing articles for sale must pass through Phencha Cherra bazar, and, if they sell their wares there instead of at Kutti Cherra, it will be open for some ill-disposed person to raise a row between the coolies of each garden, by alleging that the Setakan di coolies are stopping the supplies of the Kutti Cherra coolies.’ The Assistant Commissioner subsequently reviewed this order on the 25th August 1881, remarking that he had no power to pass a permanent injunction, and struck the case off the file, referring the matter to the Deputy Commissioner of Cachar. The Deputy Commissioner, however, declined to interfere, and informed the Hylakandi Magistrate that he saw no illegality in his order. The Assistant Commissioner, on receipt of this communication, passed the following order :—

“‘Inform Messrs. Bradley and Jameson that the Deputy Commissioner declines to interfere as Collector, and that, therefore, my order under section 518, Criminal Procedure Code, remains in force.’

“The above order and the order directing the discontinuance of the Kutti Cherra market on Thursdays appear to me to be bad in law, firstly, because the Assistant Commissioner had no power to pass an injunction without any limit as to time; and, secondly, that he could not legally revive his order on the 6th September without further enquiry.”

The judgment of the High Court (1) was as follows :—

We think that the Magistrate having, on the 25th August 1881, set aside his order of June 7th, 1881, and struck the case off the file, had no power to revive it, without a fresh proceeding, by his order of 6th September, and that he had no power,

under section 518 of the Criminal Procedure Code, to pass a perpetual injunction. See *Gopi Mohun Moulick vs. Taramoni Chowdrain*, I. L. R., 5 Cal. 7 : (S. C.) 4 C. L. R. 309.

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J. BRADLEY
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C. E. JAMES-
SON.
Judgment.

Orders under section 518 not being judicial proceedings, we have no power to deal with the present case under section 297, but we infer from the judgment in *Chunder Nath Sen* (I. L. R., 2 Cal. 295), that the order being, in our opinion, illegal, we can deal with it under the Charter. We, therefore, set it aside.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF NOMULLU AKOND AND OTHERS.

Excise Act [VII. (B. C.) of 1878], sections 53 and 59.

1882
Mar. 8th.
Nos. 37, 38, 39
and 40 of
1882.

The licensed vendor, and not his servants, is liable, under section 59 of the Excise Act (VII., B. C., of 1878), for contravention of the Act.

REFERENCE submitted by the Officiating Magistrate of Bogra dated the 28th February 1882.

The terms of the Reference were as follow :—

In these cases, the defendants were prosecuted under section 53 of the Excise Act [VII. (B. C.) of 1878], for selling fresh tari without license.

The trying officer, however, found that these were cases of selling fresh tari by, or on behalf of, licensed vendors, but at places other than those for which they had taken out their licenses, and accordingly convicted the defendants under section 59 of the said Act, and sentenced them to be fined Rs. 3 in cases Nos. 1, 2, and 4, and Rs. 2 in case No. 3, respectively.

The convictions in these cases appear to be illegal for reasons given below—

From a comparison of the Board's Excise Forms Nos. 26 and 27, page 387 of the Board's Rules, it appears that the law does not provide that any particular locality should be fixed for the sale of unfermented tari.

The judgment of the High Court (1) was as follows :—

(1) CUNNINGHAM and TOTTENHAM, JJ.

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In re
NOMULLU
AKOND.

Judgment.

We think that the conviction in question must be set aside on grounds other than those stated by 'the Magistrate who submitted the case for revision.

For it is clear that the person prosecuted under section 53 (?) for breach of license should be the licensed vendor, and not his servants.

We further note that, in three of the four cases, there is no evidence whatever on the record to show what the terms of the licenses were; or that any breach of them was committed.

We set aside all the convictions, and direct that the fines, if paid by the accused, be refunded.

It is unnecessary to consider now, whether or not the local officers have power to confine the operation of the license to particular villages in the absence of a condition to the effect in the forms prescribed by the Board of Revenue.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF HOWALDAR ROY AND } ... PETITIONERS.
WAHED ALI KHAN }

1882.
July 6th.

Appeal from Bench of Magistrates.

No. 169 of
1882.

There is no appeal to the District Magistrate from a conviction passed by a Bench of Magistrates consisting of a salaried Magistrate with second-class powers and two or more Honorary Magistrates, a Bench so constituted having, under the Government orders of 31st March 1882, the power of a Magistrate of the first class.

APPPLICATION to set aside an order made on appeal to the District Magistrate of Shahabad, on the 30th May 1882, from a conviction passed by a Bench of Magistrates on the 22nd April 1882.

The facts of the case appear from the following petition upon which the application was made :—

That, on the 11th April 1882, Jugu Mean of Biadwalia preferred a petition of complaint to the Assistant Magistrate of Arrah against Howaldar Roy, Abdul Gufur, and Syud Budrul Hossein, of assault, under section 352 of the Indian Penal Code. On the 13th April 1882, T. Inglis, Esq., Assistant Magistrate of Arrah, made the following order: Issue summons to Howaldar and Wahed Ali Khan under section 352 for the Bench of the 22nd."

That, on the 17th April 1882, the complainant, Jugu Mean, filed a petition before the said Assistant Magistrate to the effect that, in his case, Wahed Ali was not a defendant, but a peon, and, therefore, prayed for summons against Budrul Hossein Abdul Gufur, and one Debidayal with Howaldar Roy. On the

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HOWALDAR
ROY and
WAHED ALI
KHAN.

Statement.

22nd April 1882, an order was passed to "issue summons against Abdul Hossein and Budruk Hossein on payment of fees."

That the case against the petitioners came on for trial before the Jugdishpore Bench, consisting of T. Inglis, Esq., Assistant Magistrate, and George Miller, Esq., Womar Khan, and Jogeswar Prosad, Honorary Magistrates.

That, upon evidence, and for reasons stated in the proceeding of the 22nd April 1882, two members of the said Bench of Magistrates found the petitioners guilty, and fined them Rs. 5 each and costs Rs. 2, under section 352 of the Indian Penal Code; and, of the two other members of the Bench, one refused to give any opinion, and the other found the petitioners not guilty. That, against the above finding and sentence, the petitioners appealed to the District Magistrate of Shahabad. That, on the 3rd May 1882, the District Magistrate dismissed the appeal of the petitioner Wahed Ali, and, as regards the petitioner Howaldar Roy it was ordered that, in addition to the fine imposed, he should suffer two months' rigorous imprisonment under section 323 of the Indian Penal Code.

That, being aggrieved by the said orders, findings, and sentence, dated 22nd April 1882, of the Bench, and, 3rd May 1882, of the District Magistrate, the petitioners beg to move the High Court on the following grounds :—

1. That the Magistrate of the District had no jurisdiction to enhance the sentence on the petitioner Howaldar Roy, inasmuch as there was no appeal allowed by law in the case.

2. That Mr. Inglis, the presiding Magistrate, being vested with second-class powers, the Bench of which he was a member must, under the orders of the Government of Bengal, be held to have been exercising first-class powers, and hence no appeal lay to the Magistrate of the District.

3. That, even if the Bench be held to have been exercising second-class powers, the law did not expressly allow an appeal in such cases, to the Magistrate of the District.

4. That two members of the Bench not having found the petitioners guilty, they ought not to have been convicted.

5. For that there has been a mis-trial by reason of one member of the Bench refusing to give any opinion,* and yet signing* the judgment, and another member, who was for an acquittal, not recording his opinion. The conviction ought, therefore, to be set aside.

6. That, as your petitioner, Wahed Ali, was not mentioned in the petition of complaint dated 11th April 1882, and was actually ignored by the petition of the 17th April 1882, he should not have been tried at all by the Courts below.

7. That, as there is no evidence on the record that your petitioner, Wahed Ali, assaulted the complainant, or committed any other offence, his conviction and sentence in the Courts below should be quashed.

8. That, as there was no charge of hurt under section 323 against your petitioner, Howaldar Roy, nor any evidence to establish the same, the lower Court ought not to have convicted him under that section.

9. That no valid reasons have been assigned by the Lower Appellate Court for enhancing the sentence of your petitioner, Howaldar Roy, and that the sentence ought not to have been enhanced.

M. M. Ghose, for the Petitioners.

The Deputy Legal Remembrancer, *contra*.

The judgment of the High Court (1) was as follows:—

The petitioners were tried before a Bench of Magistrates at Jugdispore on a charge of an offence under section 352. The Bench was composed of an Assistant Magistrate with second-class powers and three Honorary Magistrates. The former and two of the latter signed the judgment convicting the petitioners and sentencing them to pay a fine of Rs. 5 each.

An appeal was preferred to the District Magistrate, who dismissed the appeal of Wahed Ali, and enhanced the sentence of Howaldar Roy by addition of two months' rigorous imprisonment.

On motion made by Counsel, the proceedings have been sent for, and Counsel heard on both sides. The first question

(1) MACLEAN and MACPHERSON, JJ.

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WAHED ALI
KHAN.

Judgment.

for our decision is, whether any appeal lay to the District Magistrate. This question is raised on behalf of the appellants themselves. In fact, they now assert that their appeal was improperly lodged. Had the sentence not been enhanced, we should not have entertained this objection. The case was tried under the summary procedure (Chap. XVII.), and, if the Bench was invested with first-class powers, there would be no appeal. See section 274 of the Code of Criminal Procedure. Under paragraph 1 of Government Orders published in the *Calcutta Gazette*, 1873, pp. 17 and 662, any Bench of two or more Honorary Magistrates sitting with a salaried Magistrate exercising not less than second-class powers is vested with first-class powers. The case before us was, therefore, tried by a Bench vested with first-class powers under that rule. The Deputy Legal Remembrancer has laid before us some Orders of Government dated 31st March 1882, modifying other Orders dated 31st January 1873, relating to the constitution of Benches in Shahabad. As to the Orders of 31st January 1878, we have no information. Those of 31st March 1882 justify us in holding that the Jugdispore Bench, under the presidency of a Magistrate salaried, exercising second-class powers, has jurisdiction to try all cases under section 222 of the Code of Criminal Procedure, that is, cases triable summarily by a first-class Magistrate.

We think, therefore, the District Magistrate was not competent to hear an appeal against the sentence of the Bench dated 22nd April 1882. We accordingly set aside the order of 3rd May directing that Howaldar Roy be imprisoned for two months. Counsel for the petitioners does not press his case as to the order of the 22nd April, with which, therefore, we do not interfere.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF HENRY KYTE PETITIONER.

Excise Act, VII. (B. C.) of 1878, sections 17 and 61—Possession of excise articles—Agent.

At the request of certain licensed excise-dealers in Agra, to whom liquor was consigned from Europe, A, in Calcutta, paid the duty and landing charges, and was in the act of forwarding the liquor to Agra, when the liquor was seized in his possession, and a charge laid against him of being in the possession of exciseable liquor without a pass in contravention of section 61 of Act VII. (B. C.) of 1878. A was convicted.

Held that the conviction was bad.

RULE to show cause why a conviction passed by the Presidency Magistrate of the Northern Division should not be set aside.

In this case, the petitioner, Henry Kyte, was convicted, under section 61 of Act VII. (B. C.) of 1878, of being in possession of exciseable liquor without a pass.

The liquor in question was seized under the following circumstances: It had been consigned by the S. S. "Navarino" to Martiney & Co., who were licensed dealers in Agra. When the "Navarino" arrived at Calcutta, Martiney & Co. requested the petitioner to pay the duty and landing charges, and to forward the liquor to Agra.

The petitioner paid the duty and charges, and was in the act of conveying the liquor to Howrah Station for transmission to Agra, when it was seized. He was charged under section 61 of the Excise Act, and, as already stated, was convicted and fined.

The following explanation was subsequently made by the Magistrate before whom the case was tried:—

"At the time I decided the case of *Empress* vs. *Kyte*, I presumed that clause 6, section 5 of the Board's Excise Rules, had the force of law; and the merits of the case were not fully

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Aug. 1st.
No. 161 of
1882.

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In re

HENRY KYTE.

Judgment.

argued before me. Subsequently, in the case of *Empress vs. G. S. Sykes*, the questions of law involved in the case were more fully discussed; and, after a careful consideration of all the circumstances of the case, I arrived at the conclusion that no offence had been committed, and I declared from the Bench that my decision in the case against Kyte was erroneous.

"Subsequently to this, Kyte applied to me in open Court for a review of my order in his case. And I informed him that it was not in my power to recall or rescind the order of fine, the amount of which had already been realized; and I advised him to move the High Court if he thought proper."

The following judgments were delivered by the High Court (1):—

MAC-
PHERSON, J.

MACPHERSON, J.—I am sorry to differ, but I certainly think the conviction is bad on the ground that no offence has been committed. The facts are, that certain liquor consigned to Martiney & Co., licensed vendors at Agra, was imported in the Steamer "Navarino." The petitioner, at the request of the consignee, cleared this liquor by paying the duty and landing charges. The Abkari Authorities seized it in the Strand Road while it was being conveyed to the Howrah Station for despatch to the consignee. The petitioner was convicted of having the liquor in his possession in contravention of sections 17 and 61 of the Excise Act, VII. of 1878 (B. C.). He was not himself a licensed vendor, nor had he a Pass from the Collector. The question, then, is, was the liquor in his possession within the meaning of those sections. Putting a reasonable construction on the word "possession," I hold that it was not. There is certainly a distinction between possession and a bare temporary custody or charge on behalf of another person. The liquor belonging to a licensed vendor, and was in course of transit to him. It would be a very strained construction of the sections to say that it was in the possession of the petitioner, who had merely done what was necessary to clear and forward goods to their proper destination. If it was in his possession, it was equally in the possession of the cartmen who were conveying it. I think it makes no difference, so far as the petitioner is

concerned, that the consignee was a licensed vendor, not in Bengal, but in the Upper Provinces. If this conviction is right, then *A*, who has imported liquor for his own consumption and use, would be guilty of no offence once the liquor had come into his actual possession; but *B*, who, acting for *A*, had cleared the liquor, and was conveying it from the Custom House to *A*'s house, would be guilty of an offence under section 61, because *B* was in possession of it, and the possession was not for his private use and consumption. The Courts must certainly, before convicting, inquire into the purpose of the possession, and I think they must also inquire into the nature.

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In re
 HENRY KYTE.
 Judgment.
 MAC-
 PHERSON, J.

It may be noted that in this case, though notice was given to the Government Solicitor, no one has appeared for the Government to support the conviction; and, though the Presidency Magistrate has, in two subsequent cases, come to an exactly contrary conclusion on nearly the same facts, the Excise Authorities have accepted the decision. Apart from this, however, I consider the conviction bad, and would set it aside.

As to the delay in making the application, this has been sufficiently accounted for. Delay might have been some ground for refusing the rule: it is no ground for refusing the application when the rule has been granted.

WILSON, J.—I agree on the whole with MACPHERSON, J., WILSON J. that this conviction was wrong.

We must take the facts, I think, to be these, and these only: That certain liquors arrived by the S. S. "Navarino" for Martiney & Co., licensed dealers of Agra in the North-Western Provinces; that the accused was requested by them to pay, on their behalf, the duty and the landing charges, and to forward the liquor to Agra. The liquor was seized in Calcutta as being in the possession of the accused without a Pass within the meaning of section 61 of Act VII. of 1878 (B. C.).

I do not think we can support this conviction unless we are prepared to lay down broadly that anybody who has anything to do with the transit of liquor is within the section. If the accused was within the section, I do not see why the

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In re

HENRY KYTE.

* *Judgment.*

WILSON, J.

shipowners, if they landed the goods, were not equally so. I do not see how the Railway Company, If they had carried the goods, could have escaped the necessity of obtaining a Pass, and perhaps a Pass for each District of Bengal through which they carried them.

As to the delay that has occurred, taking into consideration the fact that the Magistrate himself has since disapproved of the conviction, the effort which the accused has made in other quarters to reverse or nullify it, and that no objection is raised on the part of the Crown, I think we may properly set aside the conviction, and direct the return of the fine, and the release of the goods declared to be forfeited.

[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF EMPRESS APPELLANT;

AND

RAM SINGH AND OTHERS RESPONDENTS.

Penal Code (Act XLV. of 1860), section 283—Obstruction in public way.

The accused were charged generally with obstruction in a public way, no danger, obstruction, or injury being alleged to have been caused to any person, and were summarily convicted.

Held that the conviction could not be sustained under section 283 of the Indian Penal Code.

CRIMINAL REFERENCE submitted, on the 25th May 1882, by the Officiating Sessions Judge of the 24-Pergunnahs, under section 296 of the Criminal Procedure Code, in respect of a conviction and sentence passed by the Deputy Magistrate of Sealdah dated the 11th March 1882.

The terms of the Reference were as follow :—

“The case was tried summarily under the provisions of Chapter XVIII. of the Procedure Code. The three accused were charged on the prosecution of an Inspector of Police, under section 283 of the Penal Code, with causing obstruction in a public way, were convicted under this section, and fined in the sums of rupees ten and five. The offence, as defined, consists in this—that danger, obstruction, or injury should be caused to some person or persons in a public way in consequence of some act

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done by the accused. Obstruction is, in this instance, the only result alleged, and I submit that the conviction on a charge under section 283 should not be merely general in its terms, but that it should show on its face that some particular person or persons had been obstructed. All that the Deputy Magistrate finds, however, is, that the lane has been made narrow, and less commodious than before, to the public in consequence of the accused persons having erected a fence alongside of it. To what extent there has been an encroachment, or whether this encroachment would amount to an obstruction, the judgment does not disclose. It is possible that the case might come within the scope of section 290, the consequence or obstruction being caused to the public generally, but I think that, in a case tried summarily, the conviction, on such a charge, should be good and clear on its face. In this case, there are circumstances which render this peculiarly necessary. The Magistrate did not elect to proceed, or it may be he was not moved to proceed, under section 521 of the Procedure Code for the removal of the obstruction, if any; but the accused were at once prosecuted, and so deprived of the opportunity which might have been given under section 523, of the decision of a jury as to whether an order for removal was or was not a reasonable and proper one. It further appears that the Vice-Chairman of the Municipality had, in the first instance, been moved to take action for the removal of the obstruction, but declined to do so on the ground that the lane was as broad as it was before, and that public ground had not been encroached on. I think that the conviction should, for the reason given, be set aside, and, therefore, report the case for orders."

The following order was made by the High Court (1) upon the Reference :—

We think that, upon the finding of the Magistrate, a conviction, under section 283, Indian Penal Code, cannot be sustained. The conviction must be quashed.

(1) MITLER and MACLEAN, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF
BHOOBUN CHUNDER SHAW AND ANOTHER.*Opium Act (I. of 1878), section 9—Liability of master for act of servant.*

Contrary to the conditions of his master's opium license, the servant sold a preparation of opium between sunset and sunrise. The master was not present, and there was no evidence to show that he had, directly or otherwise, authorized the illegal sale.

Held that the master was not liable to a penalty under section 9 of Act I. of 1878.

REFERENCE submitted by the Officiating Chief Presidency Magistrate, on the 15th November 1882, for the opinion of the High Court.

The terms of the Reference were as follow :—

“Bhoobun Chunder Shaw and Muthoora Nath Ghose were charged, under section 9 of Act I. of 1878, with selling Muddat or Chundoo, at 86, Moocheepara Lane, after hours, *viz.*, at 9 P. M., on the 28th September 1882, in contravention of the Act.

“It appeared that Muthoora Nath Ghose was the servant of the other accused, Bhoobun Chunder Shaw, and that, about 9 o'clock on the night of the 28th September last, he was detected selling Muddat or Chundoo, a preparation of opium, in contravention of the conditions of his master's license, which prohibited the selling of opium after sunset.

“That the Muddat or Chundoo was sold after sunset there can be no doubt, but there was no evidence to show that the master, Bhoobun Chunder Shaw, knew of, or in any way authorized, the sale. He was not present, and it was in evidence that he had dismissed a former servant who had been convicted of selling opium contrary to his license.

“As far as Muthoora Nath Ghose is concerned, I have no difficulty, and I have convicted him of an offence under section 9 of Act I. of 1878, and sentenced him to pay a fine. It seems to

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me, however, doubtful whether I have the power to punish Bhoobun Chunder Shaw under the same section.

"The Statute is a penal one, and must, therefore, be construed strictly.

"The section referred to says: 'Any person who, in contravention of this Act, or of the rules made and notified under section 5 or section 8 . . . , sells opium . . . , or any person who otherwise contravenes any such rule, shall be liable' to the penalties laid down by the section. Then Rule XXXI. says: 'No person shall retail opium, intoxicating drugs, or poppy-heads except under license from the Collector or from a farmer, and in accordance with the conditions specified in the license,' and Rule XXVI.: 'Whenever the Collector grants a license for the retail of opium, or of intoxicating drugs, he shall impose such conditions on the license besides those specified in the license as may, from time to time, be prescribed by the Board.'

"Condition VI. of the license provides that the licensee shall not open his shop, or make sales therein, before sunrise.

"Now, there is no provision in Act I. of 1878 similar to that in Act VII. (B. C.) of 1878, which provides that the penalty for certain breaches of licenses granted under that Act shall be recoverable from the vendor, notwithstanding that such breaches may have been owing to the default or carelessness of the servant or other person employed by him. •

"The questions which I would submit for the consideration of the High Court are—

"(1) Whether the first accused, Bhoobun Chunder Shaw, is liable to a penalty under section 9 of Act I. of 1878:

"(2) Whether the license may be forfeited, no act being proved against the licensee."

The opinion of the High Court (1) was as follows:—

On a consideration of the facts set forth in the letter of the Chief Magistrate, we are of opinion that Bhoobun Chunder Shaw cannot be convicted under section 9 of Act I. of 1878.

[CRIMINAL JURISDICTION.]

MANU MEYA APPELLANT.

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Oct. 9th.*Criminal Procedure Code (Act X. of 1872), section 453—Charge—
Offences of same kind—Practice.*No. 454 of
1882.

The accused was charged under the same charge with house-breaking by night with intent to commit a theft in the house of A, and also with the same offence in the house of B, and upon his own plea, was found guilty.

Held that the accused was properly charged, as the words of section 453 of Act X. of 1872 did not limit the offences for which an accused person might be charged and tried at one trial to offences against the same person, and the meaning of the section was not restricted by the Explanation thereto.

APPEAL from a conviction passed by the Sessions Judge of Sylhet dated the 21st June 1882.

The facts appear from the judgment of the Court (1), which was as follows:—

NORRIS, J.—In this case there were four heads of charges NORRIS, J.
or counts against the prisoner, viz., *first*, house-breaking by night with intent to commit theft in the house of one Barada Pursad Das; *second*, theft from the same house; *third*, house-breaking by night with the intent to commit theft in the house of one Tarini Churn Dutta; and, *fourth*, theft from the same house. *

(1) FIELD and NORRIS, J J.

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 MANU MEYA. At the trial before the Sessions Judge, the prisoner plead-
 ed guilty to the first and third heads of charge, and was
 sentenced upon the first to three years' rigorous imprisonment;
 Judgment. and upon the third to three years' rigorous imprisonment to
 commence at the expiry of the sentence passed under the first
 NORRIS, J. head of charge.

It does not appear that any plea was recorded upon the second and fourth heads of charge; the Judge merely says: "No sentences are given under the second and fourth heads of charge, as they are included in the first and third heads."

The Magistrate committed the prisoner upon one charge only, including therein the four heads of charge to which I have referred; and the Sessions Judge tried him upon that one charge as sent up by the Magistrate.

We do not think that the courses followed by the Magistrate and Sessions Judge are illegal. Section 452 of the Code of Criminal Procedure says: "There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately except in the cases hereinafter excepted." Section 453 says: "When a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three." Then follows the Explanation: "Offences are said to be of the same kind under this section if they fall within the provisions of section 455." Section 455 says: "If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences."

Now, if we are to hold that the words, "offences of the same kind," in section 453, refer to, and include, only offences that fall within the provisions of section 455, then undoubtedly there has been an illegality; there has been an error or defect, either in the charge or in the proceedings on the trial, which would call for our interference if we were of opinion

that such error or defect had prejudiced the prisoner in his defence; but, as the prisoner pleaded guilty, he cannot be said to have been thus prejudiced. But we are of opinion that we cannot so hold. To do so would be equivalent to striking section 453 out of the Code altogether. We are of opinion that the words, "offences of the same kind," in section 453, are not to be limited by the Explanation to that section, but include such a case as this—Where a man has within a year committed the offences of house-breaking. The offences mentioned in section 455 are not in fact "offences of the same kind," but offences of different kinds arising out of a single act or set of acts. Moreover, these offences of different kinds arising out of "a single act or set of acts" must, in the contemplated section, have been committed at one and the same time. Whereas section 453, by the use of the words "within one year of each other," clearly points to offences committed on distinct occasions, separated, it may be, by 364 days. Upon the words of the Act, therefore, we are of opinion that there has been no illegality.

We now proceed to consider another point, *viz.*, whether the "offences of the same kind" mentioned in section 453 must be held to mean offences against one and the same person.

We are of opinion that they must not be so limited. There is nothing in the words of the section itself so limiting them, and we are not at liberty to introduce words of limitation unless it is absolutely necessary to do so. We are aware that, in thus holding, we are refusing to follow the decision of the High Court at Allahabad in the case of *Empress vs. Murari*, 1. L. R., 4 All. 147; but, with the greatest respect for the learned Judges who decided that case, one of whom is STRAIGHT, J., who has a most deservedly high reputation as a criminal lawyer, we do not think it is correct. As I said before, there are no words in the section limiting its operation as the Allahabad High Court would limit it. This, of itself, would, in our opinion, be sufficient ground for supporting our present ruling. But we think it well to refer to the practice of the Criminal Courts in England as furnishing authority in support of our view. According to the Common Law of Eng-

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land, there is nothing to prevent a prisoner being charged in different Courts of the same indictment on the several different felonies. In Hale's Pleas of the Crown, Vol. II., p. 173, it is laid down that, if there be one offender, and several capital offences committed by him, they may be all contained in one indictment as burglary and larceny. Larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment. See *Reg. vs. Heywood*, Le. and Ca. 451. In the case of *Reg. vs. Castro*, L. R., 6 App. Cas. 229, Lord BLACKBURN, at p. 243, makes the following observation: "The course taken with regard to an indictment was this: The Queen having sent her commission to the grand jury, or any other commission to a proper tribunal, the tribunal so authorized presented all the offences that came to their knowledge, if it was brought sufficiently to their knowledge, that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and, if there were many other persons (as generally there are), it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that, process could not be issued against a man so charged to bring him upon his trial before a petty jury to try whether he was guilty of those offences so charged or not.

"Now, at Common Law, there was no objection whatever in point of law to trying a man who was charged with several offences if those charges were all felonies, or were all misdemeanours, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and misdemeanour, and therefore felony and misdemeanour could not be tried together, but any number of felonies and any number of misdemeanours might. The contrary was asserted by the learned Counsel, but, though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not

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"fair to do it, because it might embarrass a man in the trial
 "if he was accused of several things at once, and frequently
 "the mere fact of accusing him of several things was supposed
 "to tend to increase the probability of his being found guilty,
 "as it amounted to giving evidence of bad character against
 "him. Whenever it would be unfair to a man to bring him
 "to trial for several things at once, an application might be
 "made to the discretion of the presiding Judge to say, 'Try
 "me only for one offence, or try me only for two offences; if
 "one was the real thing, let me be tried for one and one only,'
 "and, whenever it was right that that should be done, the
 "Judge would permit it. For these mixed motives, it was well
 "established by a long series of decisions (I confess I doubt
 "whether they were right at first, but certainly they have been
 "both well established now, and sanctioned by Statute—that is
 "quite clear) that, where the several charges were of the nature
 "of felony, the joining of two felonies in one count was so
 "necessarily, I may say, unfair to the prisoners that the
 "Judge ought, upon an application being made to him, to put
 "the prosecutor to his election, and send them to two trials. It
 "never was decided, even in felony, that, if that application
 "for the election was not made, the joining of several felonies,
 "that is to say, the taking several felonies which had been
 "found together, and trying those several felonies before one
 "petty jury, was wrong in point of law; on the contrary, it was
 "repeatedly held that it was right enough, although, if the
 "proper application had been made at the proper time in a
 "case of felony, the party prosecuting would have been put
 "to his election, or made to take one felony only, and not
 "both at the same time. But, in cases of misdemeanour, it was
 "by no means a matter of course that that should be done.
 "I think that, if the Judge, upon an application made to him,
 "had been satisfied that to try the man for several mis-
 "demeanours together would work injustice to the prisoner, he
 "had a perfect right to say, 'I will not work this injustice by
 "trying them together. Let us diminish them in number, and
 "try a reasonable number, and no more.' I do not know whether
 "that was ever done in a case of misdemeanour, but I feel very
 "little doubt that it may have been."

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The Legislature has enacted in two cases that three charges of felony may be charged in one indictment. 24 and 25 Victoria cap. 96, enacts that "It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them;" and section 71 of the same Act contains similar provisions with regard to three distinct acts of embezzlement. Such is the law and practice in England with regard to felonies. In cases of misdemeanour, there is no limit to the number of counts charging distinct offences that may be inserted in one indictment. In prosecution of what are called "long firm swindles," it is not unusual to insert 10 or 15 counts, each charging a separate offence against different persons. Within my own experience, there was a case tried before Mr. Justice HAWKINS at the last May Sessions of the Central Criminal Court, where the indictment contained some 120 counts, and at least 25 or 30 of these charged separate offences against different persons.

The offences in this case, house-breaking by night, or, as called in England, burglary, were, according to English Law, felonies, and, no doubt, had the prisoner been tried in England, two separate indictments would have been preferred against him, but here happily we know nothing of the antiquated distinction between felony and misdemeanour, and therefore, if our view of the law is correct, the question in this case is reduced to one of practice, and, upon this point, we are of opinion that the practice prevailing in England with regard to misdemeanour is the one that should be followed here. But the Judges should take care that prisoners are not prejudiced by that course being taken, and they should, at all times, be anxious to lend a willing ear to any application for separation of charges, and for separate trials upon separate charges. The prisoner in this case having been convicted on his own plea, there is no appeal under section 273 of the Criminal Procedure Code, except as to the extent or legality of the sentence. As I have already pointed out, we are of opinion that there is no

illegality, and, having regard to offences to which he pleaded guilty, we are of opinion. that the sentences are not at all too severe.

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This appeal will therefore be dismissed.

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FIELD, J.

FIELD, J.—I am of the same opinion. I think that the Explanation to section 453 of the Code of Criminal Procedure must be understood as extending, not as limiting, the meaning of the section itself as pointed out by my brother, NORRIS. There are, in the section, no words which limit the three offences for which an accused person may be charged and tried at the same time to offences against the same person; and I think the Explanation cannot operate to impose any such limitation or restriction upon the general language of the section.

[CRIMINAL JURISDICTION.]

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ROGHUNI SINGH AND OTHERS APPELLANTS.

No. 508 of 1882. *Criminal Procedure Code (Act X. of 1872), section 119—Statements made to police—Medical evidence, Method of taking—Expert evidence.*

It is improper for the Court in addressing the jury to refer to discrepancies between the evidence given at the trial and statements made to and recorded by the police.

The examination of an expert ought generally to be by questions put hypothetically upon facts proved or to be proved by the evidence of other witnesses.

APPEALS from a conviction and sentence passed by the Sessions Judge of Patna.

The facts are fully stated in the judgments of the High Court.

Branson, M. M. Ghose, and Babu Uma Kali Mookerjee, for the Appellants.

The Deputy Legal Remembrancer, for the Crown.

The following judgments were delivered by the High Court (1) :—

FIELD, J. FIELD, J.—This is an appeal from a sentence passed by the Sessions Judge of Patna upon three persons, Roghuni Singh, Ram Charun Singh, and Kunju Singh, who have been convicted, the first mentioned of murder, and the other two of abetment of murder, and have all three been sentenced to transportation for life. Two other persons, namely, Ram. Lall and Bhohurun, were tried together with the appellants before us, and were acquitted by the unanimous verdict of the jury.

The prisoners, appellants, have been convicted by a majority of three out of five jurors.

It appears that the jury retired for eight minutes only; and, in this case also, I desire to observe that this time was insufficient to enable the jury to consider the evidence, and deliberate thereupon amongst themselves.

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The facts of the case for the prosecution are briefly these; Two persons, Radha Singh and Mewa Singh, were said to have taken a lease of some 10 bighas 13 cottahs of land from one Lakman Mahtoon, ijaradar. On the morning of Monday, the 25th July 1882, these two persons, Radha Singh and Mewa Singh, went to a portion of the land consisting of some 10 cottahs, taking with them three labourers, namely, Sakun, Gania, and Budhun Mahtoon, for the purpose of transplanting paddy plants. There can be no doubt that, between Radha and Mewa on the one side and Ram Lall on the other side, there had been previous litigation and dissension. The story of the prosecution is, that about midday, Ram Lall and Bhohurun came and ordered Radha Singh and Mewa Singh and their workmen to desist, and then went off, giving orders to the prisoners Raghu Singh, Ram Charun Singh, Kunju Singh, and others to beat Radha Singh and Mewa Singh and their people if they did not desist.

There is no suggestion that Ram Lall and Bhohurun were on the spot when the subsequent occurrence took place. It is then said that Gania and Sakun desisted from work, but that Budhun Mahtoon still went on working, whereupon Roghuni Singh, Ram Charun Singh, and Kunju Singh came over, and Roghuni Singh struck Budhun on the head with a lati; Ram Charun Singh then struck him on the side of the temple, and Kunju Singh struck him on the side.

There can be no doubt that Budhun Mahtoon died from congestion of the brain in consequence of having been struck on the head with some hard substance.

Now, the case for the prosecution is, that this hard substance was a lati, and that this lati was in the hands of the prisoner Roghuni Singh. The case for the defence, on the other hand, is, that the injuries to Budhun's head were not and could not have been inflicted by a lati, but that they were inflicted by a wooden instrument called an arban, and that

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Radha Singh himself had struck Budhun Mahtoon with this wooden instrument while aiming a blow at one of the opposite party, which missed him, and came down on the head of Budhun Mahtoon, who was sitting down working, transplanting the paddy plants. No witnesses were called in the Court of Session to prove the case set up by the defence. And we have to consider only the evidence for the prosecution, and the manner in which that evidence has been dealt with by the Sessions Judge.

It is to be observed, however, that the prisoners, in their statement before the Court of Session, alleged that they seized Radha Singh, and took him to the cutchery close by, where the jemadar of Police was staying, and charged him then and there with having caused the death of Budhun. Now, although the jemadar examined most of the other persons who were present on the scene, he did not examine Radha, and this does seem to show that, at that particular time, Radha did not occupy the position of a witness.

A number of objections have been taken before us to the evidence produced at the Sessions trial, and the manner in which that evidence was dealt with by the learned Judge in his summing-up to the jury. I propose to deal only with two of these objections: The first is concerned with the observations which the Judge made to the jury as to the discrepancies between the account given by the witnesses in the Court of Session and the previous account of the transaction given by them to the police jemadar. I observe that the Sessions Judge read out to the jury the depositions or statements of the witnesses which were recorded by the police jemadar. I think that this was not a proper course. Section 119 of the Code of Criminal Procedure provides that these statements shall not be signed by the person making them, nor shall they be treated as part of the record, or as evidence. It is, therefore, perfectly clear that these statements are not depositions, do not prove themselves, and cannot be treated as, evidence. They might have been used by the police-officer to refresh his memory. But, even if this were done, the evidence given by the police after so refreshing his memory from these statements, and not the contents of the

statements themselves, would have been the relevant evidentiary matter. There can be no doubt that the account given by the witnesses to the jemadar and the account given by them at the trial very materially vary. The Sessions Judge, with reference to this, said to the jury: "Undoubtedly the discrepancies between the statements to the jemadar and those now made were a matter for serious consideration. The statements to the jemadar were recorded by him on the day of the occurrence, and, if he had correctly taken them down, they were more likely to be truthful than those made in Court a month afterwards. Now there were two suppositions which might be made as to the discrepancies: The first was, that the jemadar had not accurately taken down the statements. The other was, that the witnesses had really not mentioned Ram Lall and Bohurun as giving the orders, and that the present statement to that effect and other alterations from the former statements were subsequent inventions of the witnesses. As regards the first supposition, it was no doubt the case that the police did not always record statements correctly. This might arise from dishonesty and collusion, and it was evident in this case that the wealth was on the side of the prisoners. Some of them were zemindars and mokurruridars, while Mewa Singh and Radha Singh were poor men who had been sold out of their lands and almost out of their houses; or there might be mere neglect and stupidity without dishonesty." I think that it was improper to suggest to the jury that the fact of wealth being on the side of the prisoners might have influenced the police jemadar in recording the statements made to him by the witnesses, there being no evidence on the record that the prisoners or any persons on their behalf attempted to tamper with the police-jemadar.

The second objection is that the Sessions Judge was wrong in calling Dr. Shaw, the Civil Surgeon, to contradict the deposition of the Assistant Surgeon, Moalvi Asdar Ali Khan. It is further said that, even if Dr. Shaw's evidence could have been admissible, it ought not to have been admitted without calling the Assistant Surgeon, and giving him an opportunity of ex-

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plaining more fully the reasons for the opinions expressed in his deposition. The essential part of the deposition of the Assistant Surgeon is as follows: "The skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about four inches long. There was also, a superficial wound a little above the left temporal region about two inches above the ear. Underneath this wound there was no fracture. This was a slight superficial wound. There was also an abrasion below the right ear. This was very slight and superficial. Neither of the ears were hurt. On removal of the scalp, I found a patch of extravasated blood about four inches long and $2\frac{1}{2}$ to three inches broad just above the fracture." And further on: "In my opinion, one blow caused the fracture. Any flat hard substance would have caused that fracture. Under no circumstance would a lati cause such a fracture, because a lati would have cut open the scalp, and would not have caused such a widespread extravasation of blood. Neither of these two latis in Court could have caused the fracture. I examined the body thoroughly, but found no other hurt. The hurt above the left temporal region and the abrasion below the right ear could not have been caused by these latis in Court, or any ordinary lati. The abrasion below the right ear may have been due to a fall. No lati whatever would have caused it."

Dr. Shaw was called as a witness, and the following question was put to him by the Sessions Judge:—

Question.—"The Assistant Surgeon of Barh has stated in his evidence that the skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about four inches long. He has also said that no lati could produce the said fracture, because a lati would have cut open the scalp, and would not have caused such a widespread extravasation of blood. Can you state if, in your judgment, this opinion of the Assistant Surgeon is correct?"

Answer.—"In my opinion, the opinion of the Assistant Surgeon is not correct. A blow from a lati might be given

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"with sufficient force not to wound the scalp at all. Besides, "the superficial wound described by the Assistant Surgeon in "his report as half an inch long and a little above the left "temporal region corresponds with the fracture, for he goes on "to say that, on removing the scalp, the skull was found crack- "ed running from about two inches above the left meatus "across the temporal bone, the parietal backwards and upwards, "terminating at the sagittal suture. Judging from this, the "superficial wound corresponded to the upper third of the "fracture. A fracture may extend further than the external "wound. The Assistant Surgeon is also not correct in stating "that there could not be an extravasation of blood, four inches "long and $2\frac{1}{2}$ inches broad, caused by a round lathi. Unless the "wound has a particular appearance, you cannot tell from a "fracture whether it was caused by a flat board or a round "lathi. The lathi in Court could have produced a wound like "that described by the Assistant Surgeon."

There can be no doubt that Dr. Shaw has, in his deposition, based his opinion, in many important respects, not upon the facts which the Assistant Surgeon stated, but upon facts somewhat, and in one respect essentially, different. The Assistant Surgeon stated in his evidence that underneath the wound, that is, the superficial wound above the left temporal region, there was no fracture. Dr. Shaw, by a course of reasoning, arrived at a different fact, namely, that the superficial wound corresponds to the upper third of the fracture, and, upon this different fact in part, bases his opinion. Then Dr. Shaw refers to the "report," that is, the report of the *post-mortem* written in the form usually filled up by Civil Surgeons at the time of making the *post-mortem* examination. Now this report was not evidence, and therefore no facts could have been taken therefrom. The Assistant Surgeon might have used this report to refresh his memory when giving evidence, but the report itself was not admissible in evidence.

But there is a still further and a more important consideration. The Assistant Surgeon had actually seen the dead body, and had performed the *post-mortem* examination, and his evidence, as that of a medical expert, was therefore admissible,

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first, to prove the nature of the injuries which he observed on the dead body, and, secondly, as opinion evidence with respect to the manner in which those injuries were inflicted, and the cause of death. Now; Dr. Shaw had not seen the dead body, and had not made the *post-mortem* examination. And the difficulty in which he felt himself placed appears from what he says in a subsequent part of his deposition, namely, "It is difficult for me, without having seen the fracture, to form any definite conclusion about it. Reading a description would not help me so much as actually seeing the thing." Dr. Shaw was in the position of an expert witness who could give nothing but opinion evidence. The general rule as to evidence of this kind is, that the questions must be put to the witness hypothetically—put in this way: "Assuming such and such facts to be true, what is your opinion on the matter?" "Assuming such and such an injury, an injury of such and such a kind, to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?" The facts thus hypothetically stated to the witness would of course be the facts which the evidence or the other witnesses in the case attempted to prove, and as to which it was for the jury to find whether they had been proved or not. If, in this particular case, the Sessions Judge of Patna had put the question to Dr. Shaw, assuming the injuries deposed to by the Assistant Surgeon, and asking Dr. Shaw his opinion as to the weapon by which these injuries might or could have been inflicted, there might perhaps have been no valid objection to the evidence. But, even if this course had been pursued, I think that, having regard to the great importance of the question at issue, it would have been only fair to the prisoners to put the Assistant Surgeon into the witness-box, and give him an opportunity of stating his reasons for the positive assertions contained in his deposition. I may observe that, although section 323 of the Code of Criminal Procedure allows the examination of a Civil Surgeon taken and duly attested by a Magistrate to be given in evidence in the Court of Session, it does not in any way preclude the Sessions Judge from calling the Civil Surgeon, and examining him; and this course ought to

be pursued in every case in which the deposition taken by the Magistrate is essentially deficient, or requires further explanation or elucidation. Unfortunately, however, Dr. Shaw was not questioned in the manner just indicated; and he was asked to sit in judgment upon the Assistant Surgeon, asked substantially to exercise the functions of the jury in forming an opinion upon the credibility of the Assistant Surgeon's evidence. I think that this course was essentially an erroneous one. If the Assistant Surgeon had been placed in the witness-box, and allowed to give his reasons for the views contained in his deposition, he might have stated further facts observed upon the *post-mortem*, which would strongly support the correctness of his views, or, under further examination, he might himself have seen reason to modify the positive opinion expressed by him before the Magistrate. And, if Dr. Shaw had been questioned, assuming the facts to be as stated by the Assistant Surgeon, this gentleman also might have stated the reasons for his views. If, as the result, there was any substantial difference of opinion between the Civil Surgeon and the Assistant Surgeon, the jury would have been in a position to judge for themselves which view appeared to them most likely to be correct. I think that, having regard to the great materiality of the question as to the weapon used, it is impossible to say otherwise than that the prisoners have been prejudiced by the manner in which the medical evidence was dealt with by the Judge, and placed before the jury. Under these circumstances I think that this conviction must be set aside.

I have carefully considered the further order which ought to be passed in this matter, and I think that there ought to be a new trial. The prisoners called no witnesses to support the case set up by them; and, this being so, I cannot feel satisfied that their defence is so extremely probable as to make it undesirable in the interests of justice that they should a second time undergo a trial upon the serious charges preferred against them. I think I ought to point out that, while two of the prisoners, Ram Charun and Kunju, have been convicted of abetting murder, there is nothing to be found in the Judge's charge explanatory of the law of abetment, and it does not

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—
Judgment.

appear that particular conduct on their part was considered to amount to abetment within the definition under section 107 of the Indian Penal Code.

MITTER, J.—I concur.
MITTER, J.

[CRIMINAL JURISDICTION.]

HATIM APPELLANT.

1882
April 1st.
No. 171 of
1882.*Evidence Act (I. of 1872), sections 57 and 60—Science, Evidence of books of—Experts.*

Under the provisions of the penultimate paragraph of section 57 and of the first proviso of section 60 of the Evidence Act, the Court referred to Taylor's Medical Jurisprudence with reference to the effect likely to be caused by a sudden blow on the abdomen.

APPEAL from a conviction and sentence passed by the Judge of Sylhet.

The facts are stated in the judgment of the High Court (1), which was as follows:—

In this case the Sessions Judge of Sylhet has convicted one Shaik Hatim of murder, and has sentenced him to death.

The assessors did not consider the evidence sufficient for conviction.

The case for the prosecution is, that the prisoner had, some days previous to the occurrence, made improper overtures to the deceased, Pattiar Ma, a widow aged 25 or 30 years; that she repulsed him; and that, on the day of the occurrence, she was returning from the market, he came up to her, and struck her a single blow across the abdomen with a stick.

This happened on Wednesday evening, and the woman died on the following Friday night. The medical witness, an hospital assistant, "inferred" that death was the result of *peritonitis* caused by the blow. When the blow was struck, the woman had one or both hands uplifted in order to support a basket which was on her head.

The evidence produced to show that the prisoner was the person who struck the deceased consists of the statements of the deceased herself and the testimony of one Kottia, who also was returning from the market and was coming along (as

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 Judgment.

he says) five or seven cubits behind her. This witness at first told the head constable that the night was dark, and he could not recognize the person who struck the woman. When he stated in the Court of Session that he had recognized the person as Hatim, he explained that he was at first afraid to mention the prisoner's name, lest he should kill him also. We think the testimony of the witness must be received with considerable caution. There is also a witness, Goluck Patni, who says that he met the prisoner running away from the spot where, on going a little further, he found the deceased and Kottia.

There does not appear to be any reason why the witnesses for the prosecution should assist in getting up a false charge against the prisoner, and we think we may believe that the deceased said on several occasions that it was the prisoner who struck her. There is, no doubt, the possibility that she was mistaken as to his identity, but we think it a reasonable conclusion on the whole evidence that the prisoner struck the deceased across the abdomen with a stick.

Then comes the question, what was the offence committed? We think there is no proof that he intended to kill her. From the act itself, it is a reasonable inference that he intended to cause her bodily injury. Then, did he know that this bodily injury was likely to cause her death? We think there is not evidence upon which we can find that he did know.

The next question is, was this bodily injury sufficient, in the ordinary course of nature, to cause death? The medical witness was not asked this question, and we have no evidence upon which it can be answered.

We have, therefore, no evidence upon which we can come to the conclusion that the offence committed was murder within clauses 1, 2, or 3 of section 300 of the Penal Code. And the same observation applies to clause 4. There is no evidence that the act was so imminently dangerous that it must in all probability cause death. We think, therefore, that the conviction for murder cannot be supported.

From the cases and facts given at pages 560 and 645-6 of the second edition of Taylor's Medical Jurisprudence (to which work we refer under the provisions for the penultimate para-

graph of section 57, and the first proviso of section 60 of the Evidence Act), it is clear that death is often the result of a sudden blow on the abdomen.

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In this case the blow would appear to have been a severe one. It left a distinct mark on the skin. The woman was unable to proceed home unassisted after being struck. Swelling followed immediately, and the woman evidently suffered pain, and was unable to retain food. Having regard to all these circumstances, we think that we may reasonably say that the bodily injury was "likely" to cause death; and that the conviction should be (with reference to the definition in section 299 of the Penal Code) for culpable homicide not amounting to murder, punishable under the first part of section 304. We set aside the conviction for murder, and, convicting the prisoner under the first part of section 304 of culpable homicide not amounting to murder, sentence him to seven years' rigorous imprisonment.

[CRIMINAL REFERENCE.]

IN THE MATTER OF EMPRESS

AND

SAGAMBUR

1882
Aug. 10thNo. 159 of
1882.

Commitment, Quashing of—Commitment on evidence taken in absence of accused—Criminal Procedure Code (Act X. of 1872), sections 269, 351, and 327.

An accused, who was charged with murder, not being found, the witnesses were examined under section 327 of Act X. of 1872 in his absence. The accused was subsequently arrested and committed on the strength of the evidence taken in his absence. Before the Sessions Court he pleaded not guilty.

Held that the prisoner having been put upon his trial and having pleaded, the commitment could not be quashed.

Held that, if in the course of a trial, the Sessions Judge should be of opinion that the prosecution has not laid a proper basis for the reception of evidence in the absence of the accused, his proper course is to adjourn the trial under section 264 of the Criminal Procedure Code, and then, under section 351, summon such witnesses as he may deem material.

*Semle:—*The mere absence of questions in the record of a prisoner's statement do not render it inadmissible.

REFERENCE submitted by the Sessions Judge of Patna, on the 4th August 1882.

The terms of the Reference were as follows:—

"The prisoner is said to have killed his brother on 4th October 1881. He ran away, and the witnesses were examined in his absence under section 327. In June last he was apprehended in Hazaribaugh, and made a sort of confession to a Magistrate there. He was then forwarded to Dinapore, and now the Cantonment Magistrate has committed him on the strength of the evidence taken under section 327. This is illegal; for, 1st, there is nothing on the record to show that he absconded or that due pursuit was made, and that he could not

be arrested; and, 2ndly, because it is clear that the witnesses were procurable in June when the prisoner was brought back to Dinapore. The case of *Queen vs. Bacho Chowkdar*, 22 W. R., Cr. R., 33, is therefore, fully applicable.

"The so-called confession would not enable the Court to dispense with the evidence of witnesses. It has not been taken according to law, for the questions put to the accused are not recorded, and the statement is not a confession of guilt. What the prisoner says is in substance, that the accused was about to beat his (the prisoner's) wife, and that the prisoner interfered and struck deceased with a rice-husker.

"I observe that no medical evidence was taken by the committing officer, and, though Doctor Wilkes has been put down as a witness at the Sessions, he is not present in Court and is, I believe, at Nynee Tal.

"I would recommend that the commitment be quashed, and that the committing officer be directed to take the evidence including that of the medical officer, if possible, in the presence of the accused.

"The prisoner, on being called before the Court to-day, pleaded not guilty to the charge of murder."

The opinion of the High Court (1) was as follows:—

In this case the prisoner has been put upon his trial, and has pleaded to the charge. He is therefore entitled to have the trial proceeded with. The commitment cannot be quashed.

If, in the course of the trial, the Judge of the Court of Session is of opinion that the prosecution has not laid a basis for the reception of the depositions taken before the Magistrate in the absence of the accused, he should adjourn the trial under section 264, Criminal Procedure Code, and, under section 351, summons such witnesses as he may deem material.

As at present advised, we do not concur in the general proposition put forward by the Judge, that the mere absence of the questions in a prisoner's statement renders it inadmissible.

(1) McDONNELL and O'KINEALY, 37.

1884
In re
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v.
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Reference.

[CRIMINAL JURISDICTION.]

1882
Aug. 7th.
No. 152 of
1882.

DEO SARUN SINGH APPELLANT ;

AND

TULSI KANT AND OTHERS RESPONDENTS.

Criminal Procedure Code (Act X. of 1877), sections 283, 530, and 531—Breach of peace—Irregularity—Act X. of 1882, sections 145, 146, and 537.

Sufficiency of evidence to justify proceedings under section 531 of the Criminal Procedure Code (Act X. of 1872) considered.

REFERENCE submitted under section 296 of Act X. of 1872 by the Judge of Patna, on the 18th July 1882.

The terms of the Reference were as follow :—

There was a dispute between Deo Sarun Singh and Musst. Imambundi Begum's lessees about some chur land, and the Joint Magistrate brought the case under section 530. He has now attached it under section 531. Both parties object to his order.

In my opinion the order should be set aside, as there were no proceedings recorded in which the Joint Magistrate's grounds for being satisfied that there was a dispute likely to cause a breach of the peace were stated. The proceedings of the 18th April seem to have been drawn up by a mohurrir, and to have been very little attended to by the Magistrate. It reads as if it had been drawn up merely as a device to keep things straight. Instead of preceding the Magistrate's action, it comes after the Magistrate has brought the case under section 530, for on 14th April an order is passed that the case be brought under section 530, and that a proceeding be drawn up, and on the 17th there is a direction that, in accordance with former orders, the case should be taken up under section 530, and that a proceeding be recorded and the 26th April fixed. The proceeding was not drawn up till the following day, and was not properly signed by the Magistrate. I have always understood that a rubokari in proceedings must be signed at full length,

Judicial notice can be taken of a signature, but hardly, I think, of an initial. In the case of compromise an initial has been held insufficient (15 W. R., C. R., 63 and 83).

The proceedings give no grounds for the Magistrate being satisfied that there was likely to be a breach of the peace beyond Inspector Digan Lall's report. The police report may be regarded as part of the proceedings (*Kali Krishto Thakur*, 8 C. L. R. 245), but on referring to the police report in this case, I find that it too fails to show that there is likely to be a breach of the peace. It is a long and elaborate statement of the case between the zemindar and her tenants, but it does not distinctly aver that there is likelihood of a breach of the peace. Far less does it mention any overt acts, or show clearly that a breach of the peace was imminent or likely. The passage which the Joint Magistrate relies on is at the end of the report, and runs as follows: "Under the existing circumstances, and as there would be no end of disputes between the pattahdars and the ryots, I would beg to suggest that Tulsi be directed to establish his right of possession in Court, if he has any such right, and that Deo Sarun and his brother Ram Sarun, on the one hand, and Tulsi, Bhagirith Lurki, and Ramdhan, the pattahdars, on the other hand, be bound down to keep the peace." I do not think that, even if we import this expression of opinion into the proceedings of 18th April, the requirements of section 530 have been complied with.

For the above reasons, I have the honour to recommend that the Joint Magistrate's order under section 531 be set aside.

The judgment of the High Court (1) was as follows:—

We are of opinion that the Magistrate was justified by the evidence on the record in taking action under sections 530 and 531 of the Procedure Code. The only point of law that really arises is whether the signing the rubokari with his initials was sufficient to invalidate the proceedings. In regard to this it is sufficient to say that, even if the Magistrate's procedure were irregular, we are precluded by section 283 of the Code from setting aside the proceedings.

(1) McDONELL and O'KINEALY, J.

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[APPELLATE CRIMINAL JURISDICTION.]

1880
Mar. 17th.

SRINOP APPELLANT ;

No. 811 of
1879.

AND

EMPRESS RESPONDENT,

Criminal Procedure Code (Act X. of 1882) section 339—Act X. of 1872, section 349—Pardon, Tender of—Withdrawal of pardon.

A pardon granted under s. 349 of Act X. of 1872 was withdrawn by the Sessions Judge before the hearing of the whole of the evidence, without proof that the statement made by the person pardoned was inconsistent, except upon most immaterial points, with previous statements by him or contradicted by the evidence, and before any evidence affecting his veracity had been given.

Held that the pardon had been improperly withdrawn.

APPEAL from a conviction passed by the Sessions Court at Darjeeling.

In this case the question raised was whether a pardon tendered to the appellant had been properly withdrawn.

The facts are stated in the judgment of the High Court (1), which was as follows:—

The appellant Srinop has been convicted of murder and also of dishonest retention of property knowing the same to be stolen.

For the latter offence he has been sentenced to rigorous imprisonment for three years and a fine, on the expiry of which he is to undergo a sentence of transportation for life for the crime of murder.

The facts of the case are these: On the 19th July the Darjeeling Police learned from Saga Bhootea that, between the 14th and 18th of the month, his mother and wife and an old woman living with them had been murdered in his house during his absence from home. Inspector Green commenced the enquiry at Kalimpong on the 21st July, and continued it till 1st August, during which he obtained a certain amount

(1) WHITE and MACLEAN, JJ.

of evidence against a man called Kowathan whom he had arrested about 22nd July. The judicial enquiry commenced on 4th August, evidence being taken on 4th, 6th, 7th, and 11th.

On 21st and 24th September the Assistant Superintendent of Police examined the appellant Srinop, and again on 30th, on which date the latter made an important statement. This he repeated on 1st October before the Assistant Commissioner (Mr. Paul), and it was recorded in the manner laid down in section 122 of the Criminal Procedure Code.

On 9th and 10th October, the appellant was examined by the Deputy Magistrate (Mr. Craven), who was holding the judicial enquiry, under Chapter XV. of the Procedure Code. That officer continued the enquiry on October 16th and 30th, November 3rd and 5th; and on the latter date he tendered a pardon to the appellant under section 348, Criminal Procedure Code. Appellant accepted the offered pardon, and was examined as a witness on 5th November. On 6th November Kowathan was committed to the Sessions Court on the charge of murder.

On 19th November, the Sessions trial began, and after the first two witnesses (the Civil Surgeon and Saga Bhootia) had been examined, appellant was examined for the prosecution.

At the close of his examination the Sessions Judge drew up a proceeding in which he stated that the appellant's statement was "so opposed to all probability as to be utterly incredible as a true relation of what occurred;" also, that he found "it impossible to believe that this witness has conformed "to the conditions under which pardon was tendered to him. I "cannot believe that he has made a full, true, and fair disclosure "of the whole of the circumstances within his knowledge relative to the crime committed; on the contrary, I am convinced that he has given false evidence, and has carefully "concealed the essential truth of the case. I therefore, under "the Criminal Procedure Code, section 249, direct the commitment of Srinop or Srinobo for the offences which he appears "to have committed, and in respect of which pardon was tendered to him."

The trial of Kowathan was therefore suspended on 19th

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November, and the Magistrate having committed appellant conformably to the Judge's order on the 20th, the trial of the two men, Kowathan and appellant, was commenced on 21st November.

Appellant's statement made under pardon was put in evidence, and other evidence was taken, and on the 25th the assessors gave their opinions.

The first assessor (Mr. Madden) had no doubt about Kowathan's guilt, and giving much credence to appellant's different statements, he considered that appellant had lent active assistance to Kowathan, and was an abettor present at the time. He has also convicted appellant of the minor offence of retaining the stolen property.

The second assessor gave a less decided opinion as to Kowathan's guilt, but convicted him. He also convicted the appellant of aiding in the murder on his own confession, and of knowingly taking the stolen property.

The Sessions Judge, for reasons which need not be considered by us, acquitted Kowathan, but convicted the appellant Srinop, regarding whom he remarks.

"The inference from what this prisoner admits, and from the other evidence, is irresistible that he was at least a present abettor of the crime of murder, and he himself* pleads guilty to knowingly receiving property stolen on the occasion."

We entirely concur with the Sessions Judge in these remarks and we consider the appellant, on his own showing, to be a great criminal, but before we conclude this judgment we are compelled to make some remarks on the course which was taken in the Sessions Court.

It is unfortunately too probable that the perpetrator of this brutal murder of three women has not been convicted. Having carefully examined the record sent up to the Sessions Court, we find that, after a patient and intelligently conducted investigation by Inspector Green, an imperfect case against Kowathan was put before the Magistrate at the beginning of August.

There was, however, a decided want of evidence to connect

* This was a charge added by the Sessions Judge on the 21st November.

him with the murders by means of the property of the deceased women which had been stolen by the murderer and his confederates, and it was not until the arrest of the appellant about 21st September, and his statements to the Assistant Superintendent on the 24th and 30th, that the chain of evidence was completed. His statement to the Assistant Commissioner on the 1st October, and to the Deputy Magistrate on 9th and 10th, put the case against Kowathan as a principal and himself as an abettor into a very tangible form; but the Magistrate who tendered a pardon to the appellant on 5th November remarked with considerable truth that "the evidence would otherwise be insufficient to obtain a conviction, and that though concerned in the murder, he (Srinop) is not the principal party."

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It is inevitable that, under such circumstances, some one deserving punishment must go free, and it is considered that justice will be satisfied if by tender of pardon to a criminal of inferior degree, punishment is made to reach one of greater guilt. But when a pardon has been tendered and accepted, the fullest faith must be kept by both sides. No matter what degree of guilt may be admitted by the pardoned criminal he must go free, provided that he make a full, fair, and true disclosure of the whole of the circumstances within his knowledge relative to the crime committed.

In this case the Sessions Judge held that the appellant had not conformed to the conditions under which pardon was tendered to him, but had given an utterly incredible account of the circumstances, and had given false evidence. This very strong expression of his opinion was made, not after the patient hearing of the whole of the evidence, or upon proof that it was inconsistent in any but the most immaterial and trifling degree with the appellant's previous statements, or contradicted by other evidence, but on the Judge's own responsibility, and before any evidence affecting the appellant's veracity had been given.

One of the assessors (Mr. Madden) makes this remark: "Srinop's confessions, to which the assessor thinks much credence should be allowed, namely, those to Messrs. Paul and Craven, and to this Court, it is difficult to disbelieve them, as taking them all in all, there is a large measure of truth attaching to them."

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The other assessor expressed no disbelief in them, but the Judge himself, while he thought that the appellant's admissions (excluding his statements in the Sessions Court) and the evidence raised an "irresistible" inference of his own guilt, thought that they were evidently false in essential particulars.

Now, a careful examination of the various statements made by the appellant leads us to the conclusion that, excluding his preliminary statements to the Assistant Superintendent of Police, he has on the three occasions (30th September, 1st October, and 9th October) on which he was in the position of an accused, and on the 5th and 19th November when under pardon, and in the position of a witness, told substantially the same story, neither adding to, or retracting from, it in any essential particular. Nor has it been contradicted in any one essential particular, while it has been proved to be true in several. For instance, Inspector Green came to know in July that the murderer had got into the house by the window, a fact corroborated by his (appellant's) statement nearly two months later, when no communication had passed between the appellant or any one else concerned in the enquiry. There is every reason to believe that the appellant supplied the weapon with which the murders were effected, and it was recovered through his disclosures. It is certain that he became possessed of all the property taken from the house, and all that was recovered, nearly all, was recovered from persons whom he and his wife indicated. The whole of the evidence shows that the crimes were committed in all probability exactly as he says they were, and there is absolutely no evidence that his part in the crime was greater or less than he has on so many occasions stated it to have been; nor are there any grounds for supposing that he has concealed the name of any one concerned in it.

We are therefore compelled to hold that the appellant did on the 19th November conform to the conditions of his pardon, and that the Judge was not justified in saying, either on the 19th November at the commencement of the trial, or at its conclusion on the 25th, that the appellant's statement was false in essential particulars.

The committing Magistrate was pre-eminently satisfied of the substantial truth of the appellant's statements, and one at least of the assessors was also satisfied of them.

We are unable to see that they have been proved to be false in any one particular, and we are therefore of opinion that the pardon was improperly withdrawn, and the appellant improperly committed and tried.

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 Srinop
 T.
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 Judgment.

We are, however, of opinion that, under the peculiar circumstances of this case, we cannot disturb the conviction and sentence. All that we can do is, to submit the case with our opinion to the local Government, with a recommendation that the appellant should be pardoned, on the ground that he has conformed to the conditions on which a pardon was tendered to him on the 5th November 1879.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF KOMUL KISTO BONICK

1883
 Feb. 28th.
 No. 17 of
 1883.

Criminal Procedure Code, section 133—Disobedience to unlawful order—Injunction to public, Penal Code (Act XLV. of 1860), section 188—Order restraining public from walking on streets between certain hours.

The accused was convicted under the Penal Code of disobedience to a general order of the Magistrate directing the public not to frequent the roads and public places at the village of P between certain hours.

Held that the conviction was bad.

REFERENCE submitted by the Sessions Judge of Backergunge, on the 21st January 1883, for the opinion of the High Court.

The Deputy Magistrate of Patwakhali on the 5th January 1883 issued an order prohibiting people, *i. e.*, the public in general, from going about the station of Patwakhali and walking along the roads and paths thereof, between 9 P.M. and day-

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BONICK.Judgment.

light. The terms of this order were these: "After 9 P.M. and before daylight people are to remain at home, not to frequent public places, and not to go along any road or path of the station on any business whatever."

On the 8th January 1883 a fresh order reciting the disregard of the prior one, and enjoining compliance therewith, was promulgated, and on the 11th January 1883 one Komul Kisto Bonick was convicted and fined Re. 1, under section 291 of the Indian Penal Code, for disobedience of the injunction thus reiterated.

He was convicted solely for having been out of doors, and on some public road or path within the Patwakhali station at night after 9 P.M.

The Sessions Judge was of opinion (1) that the Deputy Magistrate had no authority under any provision of the Criminal Procedure Code to promulgate the order which the applicant for revision is alleged to have disobeyed; (2) that the applicant had not committed, repeated, or continued any public nuisance defined in section 268 of the Indian Penal Code, and was not therefore liable to conviction under section 290 or section 291 of the Indian Penal Code; (3) that the order not being legal, disobedience thereto is not punishable under section 188 of the Indian Penal Code, and that the conviction of the applicant is unsustainable.

He accordingly referred the matter to the High Court, suggesting that the conviction might be set aside.

The judgment of the High Court (1) was as follows:—

We are of opinion that, for the reasons given by the Sessions Judge, the conviction in this case must be set aside. Let it be set aside accordingly, and the fine, if paid, refunded.

(1) MITTER and FIELD, JJ.

[CRIMINAL APPELLATE JURISDICTION.]

JHUBBOO MAHTON AND OTHERS APPELLANTS;

AND

THE EMPRESS RESPONDENT.

1882
 April 28th.
 No. 146 of
 1882

Refreshing memory—Right of opposite party to inspect writing used to refresh memory—Medical evidence—Criminal Procedure Code (Act X. of 1872), section 323—Charge to jury—Misdirection—Penal Code—(Act XLV. of 1860), sections 34 and 149—Constructive murder.

Per FIELD, J.—The grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are threefold: (1) to secure the full benefit of the witness's recollection as to the whole of the facts; (2) to check the use of improper documents; and (3) to compare his oral testimony with his written statement; * * * but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matter contained in the same series of writings.

If the right to look at a particular writing before or at the time when a witness uses it to refresh his memory in order to answer a particular question be not then exercised, it cannot be retained throughout the subsequent examination of the witness.

Per FIELD, J.—In order that the examination of a Civil Surgeon or other medical witness may be admissible under section 323 of Act X. of 1872 against any individual accused person, it must have been taken by the Magistrate in his presence. (See now section 509 of Act X. of 1882.)

Per FIELD, J.—It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts; and, if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.

Per FIELD, J.—It may be a question whether a person, constructively guilty of murder under section 34 of the Penal Code, can be said to have committed the offence of murder within the meaning of section 149 of that Code so as to make other persons by a double construction guilty of murder.

[CRIMINAL.]

C. L. R. 104.

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JHUBBOO
MAHTON
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Judgment.

FIELD, J.

APPEAL from a conviction and sentence passed by the Sessions Judge of Patna on the 22nd February 1882.

The facts are fully stated in the judgment of FIELD, J.

Branson, M. P. Gasper, Hooda, and M. L. Sandel, for the Appellants.

Phillips (Officiating Advocate-General) and Baboo *M. Ghose*, for the Respondent.

The following judgments were delivered by the Court (1):—

FIELD, J.—In this case eight persons have been tried and convicted under section 302 read with section 149 of the Indian Penal Code, and have been sentenced to transportation for life. The circumstance out of which the case arose was a dispute concerning a piece of land, and the crop which, at the time of the occurrence, was upon this land.

The first prisoner, Jhubboo, was originally charged under sections 302, 326, 396, and 148 of the Penal Code. In the course of the trial two further charges were added, *viz.*, that Jhubboo was a member of an unlawful assembly, in the prosecution of the common object of which, namely, in taking possession of the crops by force, one of the members committed murder by causing the death of one Ibrahim Hossein, and that he was thereby guilty under section 302 read with section 149 of the Penal Code; and, secondly, that he was a member of an unlawful assembly, in the prosecution of the common object of which, namely, in taking possession of the crops by force, one or more of the members caused grievous hurt to one Torab Ali, and that he had thereby committed an offence punishable under section 325 read with section 149 of the Penal Code.

Against the next two prisoners, Lukshman Mahton and Murao Mahton, there were charges under section 302 read with section 149, section 326 read with section 149, and section 396 of the Penal Code. The charge under section 302 runs thus: "That you were members of an unlawful assembly, by a member of which, to wit, Jhubboo, an offence, to wit, the murder of Ibrahim Hossein, was committed, such as you knew

(1) McDONNELL and FIELD, JJ.

to be likely to be committed in the prosecution of the common object, to wit, the taking possession of the crops by force." Lukshman is also charged with rioting, armed with a deadly weapon, under section 148.

Against the remaining five prisoners, Harihur Mahton, Ramdehal Mahton, Sajwan Mahton, Mahabir Mahton, and Ramjiwan Mahton, there are charges under section 302 read with section 149, section 326 read with section 149, and section 396 of the Penal Code; and in these charges the common object is indefinitely stated to be "the taking possession of the crops by force." And the charges as to murder and grievous hurt allege that the accused persons knew these offences to be likely to be committed in the prosecution of the common object. There is also against Harihur Mahton an additional charge under section 148.

Two observations may be made in respect of the prisoners other than Jhubboo: First, the charges against them did not allege that the offences of murder and grievous hurt were committed in the prosecution of the common object of the unlawful assembly, and yet the jury have found that these prisoners are guilty on the ground that the offence of murder was committed in the prosecution of the common object of the unlawful assembly. The Judge gave no direction upon the matter of the charge as framed, *viz.*, that murder was such an offence as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object; he summed up as if the charge alleged, which it did not, that murder had been committed in prosecution of the common object. It is reasonable to suppose that the Judge's misdirection led the jury into error. Secondly, the charges allege that the offences of murder and grievous hurt were committed by Jhubboo Mahton. These charges were not amended by the insertion of any such words as the following: "Or some other person unknown who was a member of the unlawful assembly." The jury have found as a fact that Jhubboo Mahton did not commit the murder; and, if Jhubboo did not commit the murder, it is not easy to understand how the prisoners other than Jhubboo could be

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constructively convicted of murder on the ground that murder had been committed by Jhubboo in prosecution of the common object of the unlawful assembly.

Five persons are said to have been injured in the course of the riot, namely, Ibrahim Hossein, Imdad Ali, Gohur Ali, Torab Ali, and Abdul Karim. Of these Ibrahim Hossein has since died in consequence, as is alleged by the prosecution, of the injuries which he received on the occasion of the riot.

In the petition of appeal which has been presented to this Court a number of points have been taken; but, as they have not all been pressed upon us, I shall, before proceeding to deal with the Judge's charge to the jury, notice those only which formed the subject of the argument addressed to us.

The first point is that the jurors who tried the case were not, as they should have been, chosen by lot from the persons summoned to act as jurors. Section 239 of the Code of Criminal Procedure directs that assessors shall be chosen by the Judge. Section 240 directs that the jurors shall be chosen by lot from the persons summoned to act as jurors. If, as is alleged in the petition of appeal, the Judge himself selected the jurors, instead of choosing them by lot, he acted contrary to the provisions of section 240. But, as there is no serious contention that the appellants were in any way prejudiced by what the Judge is said to have done in this matter, I think the objection is not one which ought to be entertained for the purpose of interfering with the verdict, regard being had to the provisions of section 283 of the Code of Criminal Procedure.

The next point is, that, although the police-officer, Ram Churn Lal, was allowed to refresh his memory by looking at his diary, the Sessions Judge improperly refused to allow the Counsel for the defence to see this diary.

What really happened was this: The police-officer, Ram Churn Lal, when under examination, was asked whether he took down the statement made by the witness Liakat, and he replied that he did. He then read, or refreshed his memory by looking at, the original statement so taken down by him. This was, as I understand it, a statement taken down under the provisions of section 119 of the Code of Criminal Proce-

ture, and was not necessarily a part of the diary which a police-officer is required to keep by section 126. The particulars which section 126 requires to be recorded in a police diary do not include any written statement taken down under section 119; and, from the papers produced before us, it would appear that, as a matter of fact, the written statement was not an integral portion of the diary. Having looked at Liakat's statement, the police-officer said, in answer to a question put by the prisoner's Counsel, that it contained nothing about Jhubboo jumping on Ibrahim. The object of asking this question was to show that Liakat, in his first statement to the police, had said nothing about the prisoner Jhubboo jumping on the deceased Ibrahim. The medical evidence showed that Ibrahim had received internal injuries; and the theory of the defence was that, after these injuries were discovered upon a post-mortem examination, the witness Liakat improved his testimony by adding a statement about Jhubboo jumping on Ibrahim with the object of accounting for the internal injuries discovered by the post-mortem examination. As, however, the police-officer stated that Liakat had said nothing to him about Jhubboo jumping on Ibrahim, the object of the question was attained, and it was unnecessary for the prisoner's Counsel to ask to look at the diary.

The police-officer then stated, in answer to a further question, that the statement taken by him did not record that Jhubboo had given orders. It appears from a note made lower down by the Sessions Judge that this question also was answered by the witness after looking at the written statements taken by him when he questioned the persons afterwards called for the prosecution in the Court of Session. Here, also, as the answer of the witness was all that the prisoner's Counsel could desire, there was no necessity for him to look at the original statement with which the witness refreshed his memory, and he did not ask to do so. After this we have nearly a page and a half of the same witness's cross-examination, and then we find that the witness was asked, "Did Torab Ali say anything to you about his having seen Gohur Ali, Imdad Ali, and Abdul Karim being struck?" The answer was, "I do not remember."

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Before giving this answer it is not contended that the witness again looked at the original statements of the witnesses; and the Judge then makes this note: "The Counsel for the defence wishes to see the diary, and to make the witness refresh his memory therewith. The Court declined to do this." It is now contended that, because, before answering the two first questions above referred to, the witness had looked at the original statements in order to refresh his memory, the Counsel was entitled to see the diary when, at a later stage of the examination, the witness gave the answer, "I do not remember." I think that this contention is untenable. I have first to observe, although the term "diary" has been used, I take it that what the Judge and the Counsel were really alluding to was the statement taken down by the police-officer under section 119. Having regard to section 161 of the Evidence Act, the prisoner's Counsel was entitled to see the writing with which the police-officer refreshed his memory in order to answer the first two questions. This writing was, as to the first question, the original statement of Liakat. What the writing was with respect to the second question is not very clear.

Now, the writing which the prisoner's Counsel desired to see when the witness said "I do not remember" was, not the statement of Liakat, but the statement of Torab Ali. I think that, as the prisoner's Counsel did not exercise his right to look at the writing when the first or when the second question was answered, but allowed the examination to proceed, he lost his opportunity of claiming to look at the writing to which the witness referred before answering the first and the second questions. I do not assent to the argument that, because Counsel was entitled to see the writing which contained the statement of Liakat, he was therefore entitled to see other writings which contained the statements of persons other than Liakat, and which had not connection with Liakat's statement except that they were taken in the course of the same enquiry by the police. Nor can I assent to the argument that Counsel having a right to look at a particular writing before or at the moment when the witness used it to refresh his memory in order to

answer a particular question, and not then exercising this right, continued to retain it throughout the whole of the subsequent examination of the witness.

The grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are threefold: (1) to secure the full benefit of the witness's recollection as to the whole of the facts; (2) to check the use of improper documents; and (3) to compare his oral testimony with his written statement. The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writings. I think therefore that, at the particular stage at which the prisoner's Counsel asked to see what he called the diary, by which I presume he meant the whole series of writings containing the statements of all the persons examined by the police-officer, he was not entitled to exercise the right claimed in the particular way claimed by him. I further think that the Sessions Judge was not bound to compel the witness to look at the so-called diary in order to refresh his memory, and that it was wholly within his discretion whether he should do so or not.

The third point is that the deposition of the medical officer was taken by the Magistrate when only three prisoners, namely, Jhubboo, Lukshman, and Murao, were before him; and that, as regards the remaining five prisoners, this examination of the medical officer was improperly used as evidence in the Court of Session, inasmuch as it was not taken by the Magistrate in their presence.

Under the provisions of section 323 of the Code of Criminal Procedure, "the examination of a Civil Surgeon or other medical witness, taken and duly attested by a Magistrate, may be given in evidence in any criminal trial, although the person examined is not called as a witness; but the Court may summon such Civil Surgeon or other medical witness if it sees sufficient cause for doing so." I take it that, in order to be admissible under this section as evidence against any indivi-

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dual accused, the examination must have been taken by the Magistrate in his presence. In the present case I think it exceedingly probable that the examination of the medical witness was not taken in the presence of the five prisoners other than Jhubboo, Lukshman, and Murao. At the same time I cannot say that this is a point upon which there is no possible doubt. No specific objection to the admissibility of the medical officer's examination was taken upon this ground in the Court of Session. If such objection had been taken, it is just possible that matter might have been forthcoming to show that the other five accused were present in person or by agent (section 191, Code of Criminal Procedure) when the medical officer was examined by the Magistrate.

The medical officer was called in the Court of Session, and it has been contended before us that, as he was called, his deposition taken by the Magistrate was absolutely inadmissible. I do not assent to this argument. I think that a deposition properly taken may be put in; and that the medical officer may then be called and further interrogated upon any points upon which there had not been a sufficient examination by the Magistrate. In the present case, the medical officer was called and was cross-examined by the prisoners' Counsel. It is true that this cross examination was expressly stated to be on behalf of one of the prisoners only; but it is equally true that Counsel had an opportunity of cross-examining on behalf of all the prisoners. One important reason why a deposition not taken in the presence of a person sought to be affected by it is inadmissible, is that such person has no opportunity of cross-examining the witness. In this case all the accused were afforded this opportunity in the Court of Session. Then, further, it has not been contended that, if the medical officer had been examined again in chief in the Court of Session, any advantage would have accrued to the appellants which they could not have obtained by cross-examining him when he was called by the Sessions Judge.

Under these circumstances, I think it has not been shown to us that the prisoners were prejudiced by the irregularity if committed; and with reference to section 283 of the Code of

Criminal Procedure and section 167 of the Evidence Act, I think that this objection* would not justify us in interfering with the verdict.

Having disposed of these preliminary questions, I now come to consider the Judge's charge to the jury; and as the conclusion to which I feel myself constrained to come is that the charge is radically defective in at least two essential particulars, I shall set out the essential portions of the charge, and state somewhat fully the grounds upon which I am led to this conclusion.

After some preliminary observations, the Judge proceeds to say:—

"The first question which you have to decide is, was there a disturbance in the village of Sopawar and plot called Jhi Ketia Kunda on the Morning of Monday, the 28th November last, and were Ibrahim and four others wounded there?"

"There can be no doubt that Ibrahim is dead, and I do not think that there can be any reasonable doubt that he was killed. The medical evidence shows that he had a severe and dangerous wound on the left arm. The ulnar artery had been cut, and the ulnar bone broken and comminuted, and this wound appeared to have been inflicted with a sword. The medical evidence shows that death was the result of hæmorrhage and shock."

He then proceeds to remark upon the injuries said to have been caused to Torab Ali, Imdad Ali, Gohur Ali, and Abdul Karim; and after this he says:—

"The next questions which you have to decide are: were the prisoners present at that disturbance? Did they take part in it? Was that disturbance a riot? Did the prisoners take part in the riot? Was the common object of the rioters to take possession by force of a crop of paddy, and were the killing of Ibrahim Hossein and the wounding of the other four men done in prosecution of the common object of the rioters? The question of the presence of the prisoners and of their participation in the riot must be considered by you separately for each prisoner. You must consider if the evidence shows that each of the prisoners was present, and took part in the

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riot. If you have any doubt as to the presence or participation of any one of the prisoners, you will give him the benefit of it.

"If you find that there was a riot, and that the prisoners took part in it, then you have to consider under what circumstances the riot was committed. It is evident that the dispute was about the cutting of a crop of paddy. A most important question here arises, namely, who cultivated the land and the paddy?"

After this he discusses the question as to who sowed the paddy, and he then continues:—

"You will ask yourselves, who sowed the land—was it Jhubboo or Liakat? If you find that Liakat sowed the lands, then Jhubboo's right of private defence is gone,* whether the land was really his or not. For if he allowed † Liakat to take possession in Ashan, he had no right to resist the cutting in Aghran. If Liakat sowed the land in Ashan, even though wrongfully, his cutting the crop in Aghran was not theft, &c., so as to give Jhubboo a right of private defence. ‡ If you find that Liakat sowed the crops, and that the prisoners were present and took part in the riot, I think that you must find them guilty. §

"If again you find that the crop was shown by Jhubboo, then the question which you have to ask yourselves is, if he and his party exceeded their right of private defence. The 4th exception to section 99 declares that the right of private defence in no case extends to the inflicting more than it is necessary to inflict for the purpose of defence. Did the prison-

* The soundness of this direction is very questionable.—Note by FIELD, J.

† It is said that there is no evidence that he allowed him; that no such case was made; that the prisoners did not rely upon the right of private defence, but denied the transaction as stated by the prosecution, and that the Judge, by assuming for the prisoners' defence based on the exercise of the right of private defence, misled the jury into supposing that they admitted the facts, and sought to explain away their criminality.—Note by FIELD, J.

‡ This also is questionable. It can scarcely be said that if A wrongfully sows a crop on B's land A is entitled to reap this crop, and B has no right to prevent him.—Note by FIELD, J.

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ers or any of them exceed this limit. The evidence shows that there were some 200 Kurmis armed with swords and latties, while there were only 4 or 5 Mahomedans, and that they were unarmed. I do not think that it can be said that they needed to wound three persons and kill a fourth in order to preserve the paddy.* The case is rather one of killing and wounding under grave and sudden provocation, † and therefore punishable under sections 304, 334, and 335. Here it will be necessary for you to consider the evidence against each prisoner."

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The Sessions Judge then discusses the part which Jhubboo took in the occurrence, and adverts to the fact that the witnesses in their statements before the police, and the deceased Ibrahim in his dying declaration, said nothing about Jhubboo giving orders, or jumping upon Ibrahim when down. The direction of the Judge upon this part of the evidence was particularly favourable to the prisoner Jhubboo. In order to enable the jury to consider the effect of the evidence against each of the other accused, the learned Judge says that he here "summarized" the evidence of each witness; but the charge does not contain this summary. The Judge then proceeds:—

"If you find that the crop was sown by Jhubboo, and that he and the other prisoner had a right of protecting the crop from being cut and carried away by Torab and Liakat's party, but that the limits of the right of private defence were exceeded, you shall consider what in your opinion each prisoner did. Jhubboo is said to have ordered the killing of Ibrahim, and to have aided in doing so by stamping on his chest, &c.

"He is also said to have wounded Torab, an old and feeble man. It could scarcely have been necessary for him to do this in order to defend ‡ his property. Luchman is said to have

* It might with equal truth be pointed out that two hundred men did not need to wound three persons and kill a fourth in order to achieve the common object of getting possession of the crop.—Note by FIELD, J.

† The Judge does not say, and it is not easy to understand, what constituted the grave and sudden provocation here referred to.—Note by FIELD, J.

‡ The common object charged was not to defend or maintain possession, which would not come within the purview of clause 4 of section 41 of the Penal Code which says, "take or obtain possession."—Note by FIELD, J.

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wounded Gohur Ali with a sword, and Harihar to have wounded Abdul Karim with a sword. The other five are all said to have used their latties.

"If you believe that they did, and that they exceeded their right of private defence by doing so, then you can find them guilty of causing hurt. You will also remember that if all the prisoners joined together in assaulting the other side, and if they were not justified by the law of private defence in doing so, or if they exceeded that right by striking the other party, then they were an unlawful assembly, and each is liable for the acts done by the assembly or any member thereof.

"You will also remember the law that an assembly not originally unlawful may become unlawful afterwards. If the crop was Jhubboo's, and he and the other prisoners went to protect it, they did not commit a riot by assembling; but if they went on and attacked the other party, and in doing so exceeded the limits of their right of private defence, they became an unlawful assembly."

Now, there are parts of this charge and particularly of this last passage, more especially the words, "if they exceeded that right by striking the other party, then they were an unlawful assembly, and each is liable for the acts done by the assembly or any member thereof," which appear to me wholly defective and misleading; but I do not propose to comment upon every portion of this charge, which appears to me open to observation. I shall notice only two defects, which appear to me so serious, that I feel constrained to express my opinion that the appellants have not had a fair trial upon that grave charge upon which they have been convicted. These defects are (1) no explanation of, or direction as to, the law relating to murder was given by the Sessions Judge to the jury; (2) the jury were misdirected with respect to that portion of the charge which was concerned with section 149 of the Penal Code.

It was properly pointed out by the Sessions Judge to the jury that the seven prisoners other than Jhubboo were not charged with having themselves done any act which could constitute the offence of murder. The charge against them was that Jhubboo had committed murder, and that, inasmuch

as they were, with Jhubboo, members of an unlawful assembly, and Jhubboo, while with them a member of that unlawful assembly, committed murder, they were, by virtue of the provisions of section 149, guilty of murder, because they knew it to be likely that murder would be committed in prosecution of the common object of the unlawful assembly. Upon this charge the first essential question was whether murder had been committed by Jhubboo. There was no amendment charging in the alternative that the offence of murder had been committed by some person other than Jhubboo. The second essential question was, did the prisoners, other than Jhubboo, know it to be likely that the offence of murder would be committed in the prosecution of the common object of the unlawful assembly?

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As to the first point, the jury found that the murder was not committed by Jhubboo; and this being so, it is not easy to understand how upon the charge, as drawn, the other seven prisoners could have been convicted under section 302 read with section 149. The Sessions Judge appears to have assumed throughout the whole of his charge that the act by which Ibrahim lost his life was murder. As to what constitutes murder I find no direction whatever. It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts; and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. In this case the medical evidence goes to show injuries of three kinds: (1) there were injuries about the head and congestion of the brain—on this point nothing whatever was said to the jury; (2) there were injuries to the small intestines; and (3) there was a sword-cut on the arm. The opinion of the medical officer as to the cause of death was, that death was due to shock following the injuries of the small intestines, and to hæmorrhage from a wound in the arm. He gave no opinion, and apparently was not asked his opinion, as to whether death did or could result from the injury to the arm alone. If the jury believed that Jhubboo inflicted the wound on the arm, and also caused the injuries to the intestines, this was not very material.

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If, however, the jury did not believe that Jhubboo caused the injuries to the intestines, but believed that he inflicted the wound on the arm, this became very material. The jury appear to have disbelieved the evidence as to Jhubboo jumping upon the deceased, and so causing the injuries to the intestines. If this were so, the question at once arose whether shock sufficient to cause death was, or could have been, the result of hæmorrhage from the wound in the arm.

If the wound on the arm alone did not or could not cause death, it is impossible to say that Jhubboo committed murder. If death were the result of the combined effect of the wound on the arm and the injuries to the intestines, and the jury believed that Jhubboo inflicted the wound on the arm, and some other person unknown caused the internal injuries, Jhubboo might be liable for murder by reason of the provisions of section 34 of the Penal Code, which provides that when a criminal act is done by several persons in furtherance of the common intention of all, each person is liable for that act in the same manner as if it were done by him alone. But it may be a question whether in this case Jhubboo, being thus constructively guilty of murder, could be said to have committed the offence of murder within the meaning of section 149 so as to make the other prisoners by a double construction guilty of murder.

On these essential points no direction whatever was given to the jury.

Then, in the next place, when the jury had made up their minds as to whether Jhubboo had inflicted both injuries or one of them or neither, if they believed that he inflicted one or both, they should have been directed to consider what offence was committed thereby: and, to enable them to do so, the law relating to murder should have been explained to them. There is apparently nothing to suggest that the infliction of injury was, with reference to the first clause of section 300, an act done with the intention of causing death. It then became necessary to consider whether there was an intention of causing bodily injury, and, if so, whether Jhubboo knew this bodily injury to be likely to cause the death of Ibrahim (clause

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2, section 300). If the jury found that Jhubboo intended to cause bodily injury, but did not know this bodily injury to be likely to cause death, they ought then to have considered whether this bodily injury was sufficient, in the ordinary course of nature, to cause death; and upon this point the opinion of the medical witness would have been very material. If the jury found that it was not so sufficient, they should further have consider, with reference to the fourth clause of section 300, whether Jhubboo knew that his act was so imminently dangerous that it must, in all probability, cause death, or such bodily injury, &c. (clause 4, section 300). As to whether the act was so imminently dangerous, the opinion of the medical officer would again have been material. If the jury found that the act of Jhubboo did not come within any of the four clauses of section 300, they could not have found that Jhubboo committed murder.

But Jhubboo's act, though not falling within any of the clauses of section 300, might, with reference to section 299, have been done with the intention of causing such bodily injury as was likely to cause death, or with the knowledge that he was likely by such act to cause death. As to whether the bodily injury was likely to cause death, the opinion of the medical witness would again have been material. If the jury found that Jhubboo's act came under the portion of section 299 just referred to, this act would have been culpable homicide not amounting to murder.

The same observations are applicable if for Jhubboo some person or persons unknown had been substituted in the charge by alternative language or otherwise.

On all these essential points no remarks or observations were made to the jury; and I entertain no doubt that the appellants have been seriously prejudiced by this misdirection or want of direction. If the jury had been properly directed upon these points, it is quite possible that they would have found that the act by which Ibrahim lost his life was not murder, but the lesser offence of culpable homicide in the person who committed that act. They might even have found that this act did not amount to culpable homicide, but constituted grievous hurt only.

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I may further here remark that, although there were charges under sections 326 and 396, no instruction whatever appears to have been given by the Sessions Judge as to these charges.

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I now come to the second point. The Judge records the following note of what passed between him and the jury after they had retired to consider their verdict:—

“After about three quarters of an hour the jury returned, and stated that four of them including the foreman found all the prisoners guilty. The fifth jurymen, Baboo Kesho Ram Bhuth, doubted the guilt of the prisoners, and would acquit them.

“The foreman stated that they found the prisoners all guilty of the charges under section 149. They did not find that Jhubboo himself killed Ibrahim Hossain, and that therefore he was not guilty under the charge under section 302, which charged him with having personally murdered Ibrahim Hossain. But they found that Ibrahim Hossain was murdered by some member of the unlawful assembly, and that the murder was committed in prosecution of the common object of the assembly. They found that all eight prisoners were present and took part in the riot, and that all eight were therefore guilty under sections 149 and 302 of having murdered Ibrahim Hossain. In reply to a question from the Court, four of them stated, *i. e.*, the four who were unanimous, that they found that the crop was sown by Liakat Hossain. The fifth jurymen in reply to a question said that he doubted who had sown the crop.

“The Court concurred with the verdict. The Court had not itself felt quite certain as to who had sown the crop. But that point having been once found by the majority in favour of Liakat, it followed that the crime of the accused was murder. The Court was not prepared to dissent from the opinion of the majority that Liakat had sown the crop. That was a point on which they were the best judges; and as the Court remarked in the charge, once it was held that Liakat sowed the crop, Jhubboo's plea of private defence was gone. As the jury did not find that Jhubboo personally murdered Ibrahim, the Court could not regard him as more guilty than the others, nor

did it think that capital sentences should be passed on eight men.

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"The Court sentenced each of the eight prisoners under sections 302 and 149 to transportation for life.

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"The Court did not pass any sentence under the other sections."

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I may here observe that, when the jury were not unanimous as to their verdict, the Judge would properly have required them to retire for further consideration (see section 264, Code of Criminal Procedure). Again, this same section allows the Judge to ask the jury such questions as are necessary to ascertain what their verdict is, and directs that such questions and answers shall be recorded. The learned Sessions Judge has not complied with this direction of the law by recording the questions and answers, but has given the substance of them merely.

It will appear from the extracts above made from the Judge's charge, and from the above record of what took place between the Judge and the jury, that the jury were directed to consider whether the murder was committed in prosecution of the common object of the assembly, and that the jury found that the murder was committed in prosecution of the common object. Now, the charge against the prisoners other than Jhubboo did not allege that murder was committed in prosecution of the common object of the unlawful assembly. What it did allege was that the prisoners knew it to be likely that murder would be committed in prosecution of that object; and upon this, the language of the charge, I find no direction. It appears to me that the jury were in consequence misled to find in the affirmative something which was not alleged in the charge.

The prisoners other than Jhubboo could not, upon the charges as drawn, have been convicted of murder unless they knew that it was likely that murder would be committed in prosecution of the common object of taking possession of the crops by force. The circumstances from which the jury could infer that the prisoners knew this to be likely were not placed before them. They were told to find that which was not in

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the charge, *vis.*, whether murder was committed in prosecution of the common object of taking possession of the crops by force.

Having regard to the law as laid down in the Full Bench case of *Queen vs. Sabed Ali* [20 W. R. (Cr. R.) 5; S. C., 11 B. L. R. 347], I think the observations of the Judge upon this point, even assuming that the charge alleged murder to have been committed in prosecution of the common object, were meagre and defective, and not calculated to give the jury that assistance which they ought to have had in order to enable them to understand clearly the circumstances under which they would be justified in convicting the prisoners other than Jhubboo constructively of the serious offence of murder.

The case has, I observe, occupied no less than eight days of the Sessions Judge's time, and I should be extremely reluctant to send it back to be tried again if I saw any other way in which the interests of justice could be satisfied. Having regard to the defects which I have pointed out, I cannot satisfy myself that these prisoners have had a fair trial. At the same time their absolute innocence is not so clearly doubtful or beyond doubt that I feel justified in saying that the body of evidence which is to be found in the case should not again be submitted to a jury. I am therefore of opinion that the only proper course is to set aside the conviction and sentence, and direct a new trial; and I think that, before the new trial is commenced, the charges ought to be re-drawn more exactly with reference to the facts which have appeared in evidence. As to whether the prisoner should be admitted to bail pending the second trial, we express no opinion, this being a matter for the discretion of the Sessions Judge.

McDon-
ELL, J.

MCDONELL, J.—I concur in the decision arrived at by my learned brother. I hold that the misdirections to the jury are such as to compel us, in the interest of justice, not only to set aside the conviction and sentence, but to direct a new trial. The Judge appears to have assumed throughout the whole trial that the act by which Ibrahim lost his life was murder, unless the accused could establish the plea of private defence.

The difference between murder and culpable homicide not

amounting to murder was apparently never explained to the jury, and even if one of the unlawful assembly committed culpable homicide amounting to murder, I do not think that the jury were instructed sufficiently as to the circumstances under which they would be justified in convicting the accused other than the one who committed the act constructively of the offence of murder.

1882
HUBBOO
MAHTON
v.
EMPRESS.
Judgment
McDON-
ELL, J.

[CRIMINAL REFERENCE.]

IN THE MATTER OF EMPRESS

AND

ISHAN CHUNDER DEY AND ANOTHER. . .

1883
May 2nd.
—
No. 49 of
1883.

Excise Act, VII. (B. C.) of 1878, sections 53, 60, and 61—Interpretation of Statutes—Unlicensed Vendor—Rules of Board of Revenue—Revision, Grounds for.

A person who is not a licensed vendor under Act VII. (B. C.) of 1878 does not commit an offence by being in possession of a quantity of country spirits less than 12 quarts, although that quantity may be more than the quantity authorized by the rules of the Board of Revenue under the powers conferred on it by section 13 of the Act.

Empress vs. Kala Lalong, I. L. R., 8 Cal. 214, (S. C.) 10 C. L. R. 155, followed.

A necessity for altering a conviction from one section to another for cognate offences when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

REFERENCE submitted by the Sessions Judge of Tipperah on the 25th April 1883.

The terms of the Reference were as follow :—

“Accused No. 1 has been convicted under section 60, and accused No. 2 under section 61, of Act VII. of 1878 (B. C.). The former sold 8 quart-bottles of country spirits, and the latter had them in his possession, *i. e.*, carried them as a coolie by direction of accused No. 1.

“It is contended that the conviction of both the accused is illegal, because accused No. 1 was not a licensed vendor, and accused No. 2 might lawfully have had 12 quart-bottles in his possession.

“With regard to the case of accused No. 1, he is not a licensed vendor, but he is a servant to a licensed retail vendor, and sold the liquor as such. Section 60 applies only to sales by licensed

vendors. He ought not therefore to have been convicted under that section. It may be that he has committed an offence punishable under section 53; and, if an appeal lay to this Court, I might, perhaps, under section 423 of the Criminal Procedure Code, alter the finding maintaining the sentence, but as the case is not appealable, I cannot do so, and I cannot direct the lower Court to enquire into the offence punishable under section 53, because I could only make such order in case the accused had been discharged. Under section 436 of the Criminal Procedure Code I think I ought, therefore, to submit the case of the accused No. 1 to the High Court to be dealt with under section 439. I am inclined to think that the proper course would have been to prosecute, not him, but his master, under section 60.

"As to accused No. 2, the conviction seems unsustainable; section 61 of the Excise Act must be read with sections 15 in which the quantity specified is 12 quart-bottles. It is stated that the Board of Revenue have made an order, as they are empowered under section 15, reducing the quantity to 6 quart-bottles; but my attention has been directed to the case of *Empress vs. Kala Lalong*, 1. L. R., 8 Cal. 214, (S. C.) 10 C. L. R. 155, in which it is shown that persons who are not licensed vendors (and it is admitted that accused No. 2 is not one) do not commit an offence by possessing a less quantity than 12 quart-bottles, though the quantity they possess may be greater than that authorized by the Board by virtue of the power conferred on them by section 13. I would therefore recommend that the conviction of accused No. 2, who seems an innocent party, be set aside, and the fine ordered to be refunded to him."

The following order was passed by the High Court (1):—

Defendant No. 2 must clearly be acquitted on the authority of the judgment of this Court in the case of *Empress vs. Kala Lalong*, 1. L. R., 8 Cal. 214, (S. C.) 10 C. L. R. 155, in which we concur.

Defendant No. 1 has, in our opinion, been properly convicted, whether under section 60 or section 53 is immaterial. See *Ishur Chunder Shaha*, 19 W. R., Cr. Rul., 34, and *Baney Madhab Shaw*, 10 C. L. R. 389. We would further observe that

1883
In re
EMPRESS
v.
ISHAN
CHUNDER
DEV.
—
Judgment.
—

1883

In re
EMPRESS
v.
ISHAN
CHUNDER
DEY.

—
Judgment.

for reasons stated by the Sessions Judge himself he need not have referred the case of this prisoner. A necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF RANGAI AND OTHERS . . APPELLANTS.

1883
Feb. 27th.*Criminal Procedure Code (Act X. of 1882), sections 34, 36, 408—Appeal
—Confirmation—Practice.*No. 40 of
1883.

A Deputy Commissioner exercising the special powers conferred by section 36 of Act X. of 1872, having passed a sentence of three years' rigorous imprisonment—a sentence not requiring confirmation, an appeal to the High Court was preferred after the new Code, Act X. of 1882, came into force.

Held that, under section 408 of the latter Act, the appeal did not lie.

APPEAL from a conviction and sentence passed by the Deputy Commissioner of Luckimpore, Assam, on the 9th December 1882.

This appeal was presented on the 23rd January 1883, and a question was raised whether the appeal would lie, the sentence, which was one of three years' rigorous imprisonment, having been passed under the special powers conferred by section 36 of the old Criminal Procedure Code.

Baboo *Huri Mohun Chuckerbutty*, for the Appellants.

The following judgments were delivered by the High Court (1):—

MITTER, J.—In this case three persons, Rangai, Gowri-khan, and Beerai, were convicted, under section 457, coupled with section 109, by an officer exercising the special powers vested in him under section 36 of Act X. of 1872. They were each of them sentenced to three years' rigorous imprisonment on the 9th of December last. An appeal was presented to this Court on the 23rd of January last, and on the appeal coming on for hearing before a Division Bench of this Court on the same day, the following order was passed: "The appeal is admitted; send for the record, and issue the usual notices." The case being now called on before us to be heard finally, a question

MITTER, J.

(1) MITTER and FIELD, JJ.

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In re
RANGAI.Judgment.

MITTER, J.

has arisen whether this Court is competent to hear this case as an appeal against the conviction and sentence of the lower Court. It appears with reference to this that the provisions of the old Code and those of the new Code are not precisely the same. Under the old Code the test which determined the venue of appeal in cases like the present was, whether the officer in the lower Court exercised the special powers mentioned in section 36. In this case it is clear that the Deputy Commissioner, against whose judgment this appeal has been preferred, was exercising the special powers vested in him under section 36 of the Code of 1872. As Magistrate, he could not pass the sentence which was passed in this case; and it is also apparent on the proceeding that he was exercising the special powers under that section. That being so, it is quite clear that under the old Code the appeal lay to this Court, but under the new Code the right of appeal to this Court is restricted only to those cases in which the sentence passed by officers of this description, *viz.*, officers vested with special powers under the provisions of section 36, requires confirmation by a Superior Court. Then, whether under the old Code or under the new Code, it is quite clear that the sentence which passed in this case did not require confirmation by a Superior Court. That being so, it is also quite clear that, if the new Code applies, the appeal in this case would not be to this Court. The last section of the new Code provides that all pending proceedings would be governed by it, and if the present case could be considered as a case pending on the 1st of January 1883, no doubt the new Code would have applied, but, as already stated, the case was disposed of in the lower Court on the 9th December 1882. On the other hand, by section 2 of the new Code, Act X. of 1872 having been repealed, and this appeal having been preferred on the 23rd of January, the appellant could not claim any right of appeal which they had under the old Code, as that Code was not in force on that day. The section which deals with the right of appeal under the new Code is section 408, and that section is to the following effect: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or

any person sentenced under section 349 by a Magistrate of the first class may appeal to the Court of Session. Provided that, when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall be to the High Court." The section says generally that any person convicted on trial by the officers above mentioned may appeal to the Sessions Judge, and in certain cases to the High Court. Therefore I am inclined to think that the right of appeal in this case would be governed by the provisions of the new Code. That being so, the appellants, as a matter of right, would not be entitled to appeal to this Court; but it seems to me that it is not essentially necessary in this case to decide this question, because, whether the appeal lies to the Sessions Judge or to this Court, this seems to be a fit case for the exercise of the revisional powers given to us by the new Code. It is therefore not necessary for me to express a decided opinion on this point, but treating this case whether as an appeal or under the revisional powers vested in this Court, it seems to me that the convictions of the lower Court cannot stand. The evidence upon which the appellants have been convicted consists of the deposition of the complainant, of one Lukhee, and the so-called confessions of the two appellants, Rangai and Gowri Rangai's confession, it is alleged, being supported by the discovery of a pair of bracelets which are said to have been dug up by Rangai in the presence of the Inspector from a particular place in his house. As to the discovery of the pair of silver bracelets, we find in the first place that they were not at all mentioned in the list of stolen articles given by the complainant to the Inspector on the morning after the alleged theft. It is also a remarkable fact in this case that, when the houses of the prisoners were searched immediately after the suspected theft, nothing whatever was found. Furthermore, there is also the remarkable fact that several days afterwards, when a neighbouring well was searched, a box containing several silver ornaments and two pieces of notes amounting to Rs. 100 was found. It was alleged by the complainant that he had in the box which was missing about Rs. 1,500 in cash, and several

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RANGAI.*Judgment.*

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MITTER, J.

gold and silver ornaments, but, with the exception of the notes for Rs. 100, no portion of the Rs. 1,500 was found in this box, and none of the gold ornaments which were alleged to have been stolen. These circumstances raise in my mind a suspicion that probably there was no theft at all in the house of the complainant, and this suspicion is strengthened by the fact admitted in this case that this man neglecting his legitimate duty was gambling in some place adjoining the house from 9 P. M. till 4 A. M. But, whether there was a theft or not, it is quite clear to my mind that the evidence adduced in support of the conviction does not connect the appellants before us with the occurrence, supposing that there was a theft in the house of the complainant. Putting aside the discovery of the bracelets, the evidence consists only of the depositions of the complainant, of one Lukhee, and the alleged confessions of the two prisoners. On looking at the confessions, the first observation that arises is this: that, if we are to accept these confessions as representing the true state of affairs, it would appear that the appellants who made these confessions were not at all guilty of the offence charged against them, but were simply men who by some means or other had become aware of a plot that was entered into by others in order to commit that offence. Then, again, we find that one of those appellants who were said to have made those statements criminating themselves complained to the Deputy Commissioner before his confession was actually recorded that he was being ill-treated by the Police. No doubt, the Deputy Commissioner after investigation says that that charge was not made out; but, whether it was made out or not, there is the fact that, before this alleged confession was made, a complaint was made to him that the Police was attempting to extort a confession from the appellant. Then, as to Lukhee's evidence, it is quite clear that no reliance can be placed upon his statement. He says that the plot to commit this theft was planned and matured in his presence at his own house, and his story is that he remained silent, and did not give any information to the authorities until three weeks after the alleged occurrence. It must also be remembered that, before Lukhee came forward to depose to the facts stated by him, a

reward had been offered of Rs. 200 to be paid to any one who might give information which would lead to the apprehension and conviction of the offenders. Under these circumstances it seems to me that no reliance whatever can be placed upon the evidence of Lukhee. On the whole, I do not think that the evidence is sufficient to support the conviction of the prisoners. We accordingly set it aside, and direct their immediate release.

FIELD, J.—In this case the appellants were convicted on the 9th of December last by a Deputy Commissioner in Assam exercising the special powers which could be conferred under section 36 of the Code of Criminal Procedure, Act X. of 1882. That the Deputy Commissioner as District Magistrate was exercising these powers appears on the face of these proceedings, and with reference to the provisions of section 270, Act X. of 1872, it is also clear that the District Magistrate was exercising these powers, because it appears from the sentence awarded, *viz.*, three years' rigorous imprisonment, that such officer was exercising such special powers. As District Magistrate, the Deputy Commissioner could only have passed a sentence of two years' rigorous imprisonment. This being so, it is clear that, under the provisions of section 270 just referred to, the appeal lay to the High Court, and not to the Court of Session. But it is to my mind clear that the present Code, Act X. of 1882, has altered the law. Section 408 of the present Code enacts thus generally: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or any person sentenced under section 349 by a Magistrate of the first class, may appeal to the Court of Session, provided that, when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such a case shall be to the High Court." Now, it is clear to my mind that the words "District Magistrate" here include a District Magistrate vested with special powers under section 30 of the present Code. It is therefore clear that all cases tried by a District Magistrate so vested are as a general rule appealable to the Court of Session, unless, in any particular case, the sentence being subject to the confirmation of the Court of

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In re
RANGAI.*Judgment.*

MITTER, J.

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RANGAI.Judgment.FIELD, J.

Session is appealable to the High Court. Now, the sentence passed in the present case is a sentence of three years only, that sentence according to the old law and to the new law did not, and does not, require confirmation, and therefore it is clear to my mind that, under the words of the present Code, the appeal in this case lay to the Court of Session, because the sentence passed was not subject to the confirmation of the Court of Session. The appeal was presented to the High Court after 1st January, and the question arises whether the High Court has jurisdiction to entertain the appeal so presented. It appears to me that the High Court as a Court of Appellate Jurisdiction cannot entertain this case as an appeal. Section 558 of the present Code relates to pending cases. Now, this was not a pending case, and therefore it does not come within the purview of that section. Then it is contended that section 6 of the General Clauses Act, I. of 1868, will apply. It appears to me that this appeal cannot, within the meaning of that section, be termed a proceeding commenced before the repeal of Act X. of 1872. The proceedings on the original trial terminated on the 9th of December. The proceeding before us is an appeal, and no such proceeding was commenced before us on the 1st of January. That being so, it appears to me that the case must come under the general language of section 408, *vis.*, that any person convicted on a trial held by a District Magistrate may appeal to the Court of Session. That language is general; it is in no way restricted to persons convicted after the Code came into operation, and it is sufficiently wide to include the cases of persons convicted before the new Code came into force. This being so, I am of opinion that the appeal in the present case ought to have been made, not to the High Court, but to the Court of Session. I am, however, quite of opinion with my learned colleague that, having regard to the distance of Assam from Calcutta, having regard to the mistakes that may probably be committed upon a change in the law, and, moreover, having regard to the facts of this particular prosecution, it is a proper case in which to exercise the revisional jurisdiction of this Court. This being so, I have concurred in hearing this case as a case taken up for revision. As to the remarks on

examination of the evidence, and generally on the merits of the case, which have just been made by my learned colleague, I entirely agree, and I think that these appellants must be acquitted and discharged.

1883
In re
RANGAI.
Judgment.
FIELD, J.

[CRIMINAL JURISDICTION.]

SHADULLA HOWLADAR, AND ANOTHER . . . APPELLANTS.

1883
May 7th.

Criminal Procedure Code (Act X. of 1882), section 309—Summing-up before Assessors—Heads of summing-up.

No. 184 of
1883.

The effect of summing up, under the provisions of section 309 of the Criminal Procedure Code, the evidence in a case tried with assessors is to enable the Sessions Judge in a long or intricate case to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion. If, in summing up the evidence, the Judge is unable himself to record the heads of his summing-up, he should avail himself of the services, not of a pleader for the prosecution, but of a Court officer, or of some independent person.

The opinions of assessors should be taken individually, and not through one of their number.

Where the Judge considers the evidence against some of the persons accused unworthy of belief, he ought not to acquit them without having first taken the opinion of the assessors.

APPEAL from a conviction and sentence passed by F. J. G. Campbell, Esq., Officiating Sessions Judge of Furriddpur, on the 12th March 1883.

The facts are stated in the judgment of the High Court.

Baboo Greeja Sunker Mojoomdar, for the Appellants.

The Deputy Legal Remembrancer, for the Crown.

The judgment of the High Court (1) was as follows :—

After considering the evidence on the record in this case we are of opinion that the appellants have been rightly convicted under sections 149 and 304 of the Indian Penal Code. It is clear that they were the ringleaders in a premeditated riot

1883
 SHADULLA
 HOWLADAR.
 Judgment.

with the knowledge and intention necessary to bring them within those sections. The mob of which the appellants were the ringleaders consisted of about one hundred and twenty-five men, said to have been armed with shields, spears, and clubs. One man was killed, and others were injured.

On these facts we hold that the appellants have been properly convicted, and we also think that the sentences passed on them were not too severe. The appeals are therefore dismissed.

It is necessary, however, to make some observations on the procedure adopted by the Sessions Judge. He has taken advantage of the terms of section 309 of the present Code, to sum up the evidence for the prosecution and defence to the assessors. This provision has for the first time been introduced into our Code, and in our opinion the object is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion.

In the present case we observe that the Judge seems rather to have taken an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence. He observes on one point: * * * "Although you may utterly disbelieve the witnesses, as this Court has done with regard to those persons (who had been acquitted), but yet there is no ground for disbelieving them with regard to those men who have been named from the beginning.

Now, it is impossible to suppose that the assessors could have been otherwise than very much embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by the Judge. There are other passages in the summing-up, which might be quoted, to a somewhat similar effect.

In the next place we observe that the summing-up has been recorded by the pleader for the prosecution, and accepted by the Judge as correct. We think that such a course should not have been taken by the Judge, and that, if he was incapable himself of recording the heads of the summing-up to the assessors, he should have availed himself of the services of some court officer, or directed it to be done by some independent person.

We next find that, instead of taking the opinion of each assessor as is required by law, the Judge has received the opinions of all the assessors combined as delivered through one of them, whom he thus regards as the foreman of a jury.

1883
SHADULLA
HOWLADAR
Judgment.

We further observe that four other persons, who were under trial along with the appellants, were acquitted by the Sessions Judge at the termination of the evidence for the prosecution. The ground on which the judgment of acquittal was based is, that the evidence of identification was unworthy of belief.

Under such circumstances it was the duty of the Judge, before passing judgment himself, to ask for and record the opinions of the assessors on that evidence. The Judge, however, has thought it unnecessary to do so, because he considers that there was "no evidence" against the accused, the fact being, that there was evidence which the Judge thought unworthy of belief.

[CRIMINAL JURISDICTION.]

CHUNDER CHURN MOOKERJEE AND OTHERS. APPELLANTS.

Act XII. of 1875, section 22—Port of Calcutta—Liability of master for acts of servant.

1883
May 7th,
Nos. 155, 156.
157 of 1883,

To justify a conviction under section 22 of Act XII. of 1875 it must be shown that the accused, if he did not himself throw the ballast or rubbish into the Port intentionally caused some one else to do so. A master is not liable for his servant's acts done in contravention of that section, unless it can be shown that the acts were done by his authority.

APPEALS from convictions and sentences passed by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta.

Babu *Urbica Churn Bose*, for the Appellants.

Phillips (Standing Counsel) and Mr. *H. A. Adkin*, for the Crown.

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CHUNDER
CHURN
MOOKERJEE.

Judgment.

The facts are stated in the judgment of the High Court (1), which was as follows:—

The appellant has been convicted before the Chief Presidency Magistrate of an offence against section 22 of Act XII. of 1875 by improperly discharging ballast from the Ship *Ben Nevis* by the boats of Bishto Manjhi and Nufur Manjhi, and by throwing it into the river within the Port of Calcutta; and has been sentenced to pay a fine of Rs. 250. The amount of the fine entitles the accused to appeal to this Court.

In our opinion the conviction is bad in law; for the facts proved or admitted do not establish any offence under the Act against the appellant. The first clause of section 22 prohibits the casting of ballast or rubbish into the Port without lawful excuse. The next clause prescribes a penalty for whoever by himself or another, so casts or throws the same, and for the master of any vessel from which the same is cast or thrown. It seems to us that to warrant the conviction under this section of a person, not being master of a vessel from which ballast is thrown, it must be shown that the accused person, if he did not himself throw the ballast or rubbish into the Port, intentionally caused somebody else to commit that offence.

In this case all that is proved or admitted against the appellant is, that he made an agreement to remove the ballast from the Ship *Ben Nevis*; that he engaged boats for that purpose; and that the ballast was removed from the ship in those boats. The boatmen instead of landing the ballast at the proper place, threw it into the river within the limits of the Port. They were arrested, convicted, and fined. Proceedings were subsequently taken against the appellant under the same section, when the Magistrate held him "liable for his servants' acts," and accordingly convicted and sentenced him. We cannot bring ourselves to accept this doctrine as admissible in dealing with a person accused of an offence, unless his liability for the acts of another is specifically declared by Statute. The learned Standing Counsel who has supported the conviction admits that in a criminal trial the doctrine laid down by the Magistrate in this case would not be applicable, but he

endeavours to distinguish this case from a criminal matter by describing it as *quasi* criminal, or as one relating not to an "offence," but to a mere breach of rule. And in such a case he submits that knowledge or intention on the part of the person who is accused in respect of something done by other persons is not essential.

1883
CHUNDR
CHURN
MOOKERJEE.
—
Judgment.
—

We cannot, however, apprehend the distinction so suggested as entitling a Criminal Court to place a person accused of what is described as a *quasi* criminal act at a disadvantage from which one charged with serious crime would be protected; *viz.*, the being held responsible for the acts of another without any proof of abetment or connivance on his part, and in the absence of any statutory provision fixing him with such responsibility. We observe that Act XII. of 1875, in Chapter VIII., refers to breaches of it as "offences," makes them triable by a Magistrate, and provides for the enforcement of penalties on conviction. The trial then was, we apprehend, a criminal trial, and the same principle will apply to it as to other criminal trials.

If the Legislature had intended to make persons in the appellant's position criminally liable for acts done by persons employed by them, without proof of connivance, it would surely have provided for this in the Act. The very section (22) and following sections do enact that the master of any vessel shall be liable to be punished for acts done on board in breach of the rules laid down, though they may possibly be done without his knowledge or even against his orders. This specific creation of criminal liability as against the master shows that without it he would not be liable for an act not done or expressly permitted by himself.

We find nothing in the Act which renders the appellant liable to punishment for the acts done by others not proved to have been by his abetment or connivance.

We therefore set aside the conviction, and direct that the fine, if paid, be refunded.

For these reasons we set aside the convictions and sentences in appeals Nos. 156 and 157.

[CRIMINAL APPELLATE JURISDICTION.]

KRISTO BEHARI DASS APPELLANT;

AND

THE EMPRESS RESPONDENT.

1883
Mar. 13th.
—
No. 75 of
1883.

Criminal Procedure Code (Act X. of 1882), section 310—Proof of previous convictions.

Per Curiam:—In trials before a Jury or Assessors the record should invariably show that reference to a previous conviction was not made until the accused had been convicted of the subsequent offence.

APPEAL from a conviction and sentence passed by the Sessions Judge of Pubna and Bogra.

In this case the record did not show that the accused had been convicted of the offence charged against him on a trial before a Jury before the charge of having been previously convicted was put to him.

In rejecting the appeal upon the merits, the High Court (1) made the following remarks:—

The appellant having stated in his petition of appeal that none of his witnesses were examined in the Sessions Court, the record has been sent for, and on examination it appears that some of the witnesses for the defence were examined, and the remainder “renounced.”

There is nothing in the case which calls for interference. But we observe that the Sessions Judge has entirely overlooked the provisions of section 310 of the Code of Criminal Procedure. The record should invariably show that reference to the previous conviction has not been made until the subsequent offence has been found proved against the accused. The Judge's particular attention is called to the new law in this respect.

The appeal is rejected.

(1) CUNNINGHAM and MACLEAN, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF PEARY MOHUN SIRKAR } PETITIONERS.
AND OTHERS }

1883
Mar. 1st.

Penal Code (Act XLV. of 1860), section 143—Unlawful Assembly.

No. 32 of
1883.

The accused were convicted of being members of an unlawful assembly under the following circumstances : There was a dispute of long standing as to certain land, no one being in undisputed possession. The accused went to sow the land with indigo, accompanied by a body of men armed with latties, and prepared to use force if necessary, and the lattials kept off the opposing faction by brandishing their weapons while the indigo was being sown.

Held that the accused were properly convicted of being members of an unlawful assembly under section 143 of the Indian Penal Code.

Shunker Singh vs. Burmah Mahto 23 W. R. Cr. 25, distinguished.

RULE to show cause why a conviction passed by the Joint Magistrate of Rajshahye, dated the 4th January 1883, and confirmed on appeal by the Sessions Judge of that District on the 20th July 1883, should not be set aside.

1883

In re
PEARY
MOHUN
SIRKAR.

Judgment.

The prisoners in this case were convicted of being members of an unlawful assembly, and sentenced to three months' rigorous imprisonment under section 143 of the Indian Penal Code. The facts appear from the judgment of the Sessions Judge, which was as follows :—

It does not seem to be seriously denied in this case that the retainers of Messrs. Watson and Co., went in a large body to sow down indigo on the lands which are referred to by the witnesses, and that many of these retainers were armed. This fact is proved by the clearest evidence, and the evidence of the constable Perameshwar Singh shows that, while the lattials were brandishing their latties, some 60 persons sowed down the lands with indigo. The pleader for Messrs. Robert Watson and Co., relying upon the case of *Shunker Singh vs. Burmah Mahto*, 23 W.R.25, Cr. Rulings, contends that the charge in this case cannot be sustained, as the intention of the defendants was not to enforce a right, but to maintain undisturbed the subsisting enjoyment of their rights. It seems to me, however, that the ruling above quoted is not applicable to the present case. It referred to the enjoyment of water actually flowing, and to the protection of the then subsisting enjoyment, of this right, under circumstances where there was no time to have recourse to the police authorities. In the case now under appeal it is clear that the land, of which the enjoyment is claimed, is disputed land, and it will appear from the deposition of Jogendra Nath Chakrabarti (who made measurements in the locality on behalf of Government in April and May last) that it was the subject of dispute at that time also, as well as in the following November, when it re-appeared from the bed of the Pudma river. It is further clear that indigo was sown on the 1st of November 1882 on the top of mustard plants with four or five leaves (see evidence of Perameshwar Singh and Sub-Inspector Jaggat Bondu Boshu); and, from the fact of the lattials running away at the approach of the Police, it may be presumed that they were not merely maintaining their existing rights, but enforcing their possession upon the mud which is the subject of dispute between the plaintiff and his fellow-ryots on one side, and Messrs. Robert Watson and Co., and their dependents on the other. Though, from the whole circumstances of the case, I am inclined to believe that the mustard had germinated when the indigo-seed was sown, yet I agree with the Joint-Magistrate that the evidence on the record is not sufficient to prove conclusively that either party was in *bona-fide* possession. It was clear, however, that both parties claimed the right of possession, and that these claims arose

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 PEARY
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 SIKKAR.
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as soon as the disputed land re-appeared from the bed of the river. It is the forcible assertion of this claim on the part of the appellants which is the subject of the present charge against them. The appellant's pleader has drawn attention to the fact that the first information report is dated a week later than the occurrence to which it refers, but this is clearly explained by the Sub-Inspector Jaggat Bondu Boshu, who has been specially deputed for nearly a year to prevent disturbances on the Moorichdyar and the neighbouring clurs on the Pudina river, and it appears that the case was actually under investigation for several days before the formal information report was taken down. From a review of the whole evidence, I concur with the Joint-Magistrate in the opinion that the appellants are guilty of the offence of which they have been convicted, and I accordingly dismiss this appeal.

The accused then applied for and obtained this rule to show cause why the convictions should not be set aside.

Evans, for the Petitioners.

The judgment of the High Court (1) was as follows :—

This was a rule granted to show cause why a conviction should not be set aside on the ground that, assuming the facts found to be correct, the conviction was bad in law. We have had the advantage of hearing the arguments of the petitioners' Counsel, and it appears to us that, assuming the facts found to be correct, the conviction is good in law. The facts found are these : That there was no one in undisputed possession of the land in question ; but that a dispute of some considerable standing existed between the two parties as to who was entitled to the land, and who was in possession of it ; that a number of persons of the petitioners' party went to sow the land together with a body of men armed with latties ; that they were prepared to use force if necessary, and that they stationed these lattials to keep off the opposite party, and these brandished their weapons while the land was sowed. That falls within the definition of the offence, because there was an assembly for the purpose of enforcing a right by criminal force or a show of criminal force.

It was contended that this case was governed by the case

(1) WILSON and MACLEAN, 55.

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PEARY
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Judgment.

of *Shunker Singh vs. Burmah Mahato*, 23 W. R. 25, Cr. Rulings. But, as was pointed out by the Judge in the appeal Court in this case, that case is distinguishable. It was decided on this ground that what was done there was an act justified by the sections relating to private defence, and it was expressly pointed out that it did not fall under cl. 3 of section 99 of the Penal Code. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. In this case it appears that there was plenty of time to have recourse to the public authorities, therefore the law as to private defence does not apply.

The rule will be discharged.

[CRIMINAL APPELLATE JURISDICTION.]

BEPIN BEHARY SHAHA APPELLANT;
AND
EMPRESS RESPONDENT.

1883
Aug. 3rd.
No 355 of
188.

Criminal Procedure Code (Act X. of 1882), sections 310 (a) and 537—Irregularity.

Where in a trial by Jury the Sessions Judge called upon the accused to answer at the same a charge of theft and also a charge of having been previously convicted, the High Court refused to interfere, if not appearing that a failure of justice had been caused by the irregularity.

APPEAL from a conviction passed by the Sessions Judge of Moorshedabad.

In this case the accused was tried for theft before the Sessions Judge sitting with a Jury. The Sessions Judge, after

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EMPRESS.

Judgment.

the evidence for the prosecution had been recorded, asked the accused what he had to say, not only 'to the charge of theft, but also to a charge of having been previously convicted.

The Jury found the prisoner guilty of the theft. The accused appealed against the conviction and sentence, among other grounds, on the ground that the Sessions Judge ought not, under section 310 (a) of the Criminal Procedure Code, to have called upon him to plead to the charge of having been previously convicted until he was found guilty of the subsequent charge of theft.

The judgment of the High Court (1) was as follows :—

In this case the Sessions Judge has failed to observe the directions prescribed in section 310 (a) of the Code of Criminal Procedure, inasmuch as he has at one and the same examination of the prisoner, after the evidence for the prosecution had been taken, inquired from him what he had to say on the charge of theft, and also on the charge of having been four times previously convicted.

We have therefore had to consider whether, in consequence of this error or irregularity, a failure of justice has been caused, that is to say, whether the appellant has been prejudiced. The theft charged is so clearly proved that, in our opinion, the Jury could not have been influenced in their verdict by this irregularity. The appeal is therefore dismissed.

(1) PRINSEP and TOTTENHAM, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF KALLY MOHUN APPELLANT ;
MOOKERJEE

AND

EMPRESS RESPONDENT.

1883.
Augt. 3rd.

No. 99 of
1883.

Criminal Procedure Code (Act X. of 1882), section 195 and 537—Sanction to prosecute—Omission of—Irregularity.

Were a witness was prosecuted for disobedience to a summons without sanction previously obtained under section 195 of the Criminal Procedure Code, the High Court refused to interfere, there being no evidence that the want of sanction had occasioned a failure of justice.

REFERENCE submitted under section 438 of the Criminal Procedure Code by the Officiating Sessions Judge of Dacca.

The following were terms of the reference :—

The Assistant Magistrate directed that certain witnesses in a case before him should be prosecuted for disobedience of summons. The Joint-Magistrate, while complying with that requisition, proceeded at the same time to prosecute one Kally Mohun Mukhopadhyaya, who was defendant in the original case, and whom the

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C. L. R. 109.

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Asistant Magistrate had not directed to be prosecuted. Thus the sanction required by section 195 in the case of Kally Mohun Mukhopadhyia, who has been convicted of an offence under section 172, I. P. C., is wanting, and this is admitted by the Joint-Magistrate in his explanation dated the 25th ultimo.

I have therefore to ask that the conviction of Kally Mohun Mukhopadhyia may be set aside, and that the fine of Rs. 25 paid by him may be refunded. I make this application the more readily, because I think the evidence on the record did not warrant this man's conviction.

The judgment of the High Court (1) was as follows :—

The want of sanction to a prosecution under section 195 of the Code of Criminal Procedure is, under section 537, no valid ground for the reversal of a conviction, unless such want has occasioned a failure of justice. No such failure has been stated by the Sessions Judge who has referred this case, nor is such apparent from the record.

There is evidence on the record which, if believed, is sufficient for the conviction of Kally Mohun, although, in the Sessions Judge's opinion, it may not warrant it. On this point, as a Court of Revision, we express no opinion.

Let the record be returned.

(1) PRINSEP and TOTTENHAM, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF EMPRESS VS. ARSHED ALI.

Penal Code (Act XLV. of 1860), section 498—Marriage, Evidence of—Evidence Act (I. of 1872), section 60.

1883
July 25th.
—
No. 89 of
1883.

To justify a conviction under section 498 of the Indian Penal Code, it is not sufficient for the prosecution to prove that the complainant and the woman in respect of whom the charge is made lived together as man and wife. It is necessary that facts constituting a valid marriage should be proved in accordance with section 60 of the Evidence Act.

See *Pitambur Singh, In the matter of*, 5 C. L. R. 597 (F. B.), (S. C.) I. L. R., 5, Cal. 544.

REFERENCE submitted by the Officiating Sessions Judge of Backergunge, on the 16th July 1883, recommending that the conviction of one Arshed Ali, and the sentence passed upon him under sections 384 and 489 of the Indian Penal Code, should be set aside.

The terms of reference were as follow :—

Arshed Ali was, on the 26th October last, charged by one Fazeemuddin with enticing away the latter's wife, Yarjan, with intent to have illicit intercourse with her. The petition of complaint represents the charge to be preferred under section 498, I. P. C., alone, and the preliminary examination of the prosecutor endorsed thereon sustains no other. On the 7th February last, he was, however, formally charged, (1) with an offence punishable under section 498, I. P. C.; (2) with having wrongfully confined the prosecutor (section 342, I. P. C.); (3) with having committed extortion (section 384, I. P. C.). What he extorted neither the charge nor the finding specifies, but on the 9th April he was sentenced to four months' rigorous imprisonment under each section specified above by the Second-class Magistrate, who is the Sub-divisional Officer of Bhola.

On appeal the convictions and sentences were upheld by Mr. Dutt, the Magistrate of the District.

The conviction under section 342, I. P. C., is legally unimpeachable.

To the conviction under section 498, I. P. C., Counsel for the applicant objects that, (1) strict proof of the marriage has not been given; (2) that, prior to the date of his complaint, Fazeemuddin had divorced his wife, and registered such divorce

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 —
 Reference.
 —

under Act I., 1876, B. C. Mr. Dutt in his explanation admits that strict proof of the marriage might and could have been, but was not, given. In other words, there is on the record no proof of the ceremony by which Fazeemuddin and Yarjan were constituted husband and wife, though, of the subsistence of the conjugal union between them, I, in common with the Magistrate, entertain no doubt. In support of his opinion that such proof is not indispensable, Mr. Dutt quotes 17 W. R. 5, Cr. (8 B. L. R. App. 63). That decision has, however, been overruled by I. L. R., 5 Cal. 566, (S. C.) 5 C. L. R. 597 (F. B.), which STRAIGHT, J., has followed in I. L. R., 5 All. 233, and to which the Counsel for the applicant for revision states that he drew Mr. Dutt's attention at the hearing of the appeal. The Full Bench decision clearly prescribes strict proof of marriage as indispensable to a valid conviction under sections 494, 497, and 498, I. P. C., and that, failing in this case, the applicant's conviction under section 498 is bad.

With regard to the second point, Mr. Dutt in appeal found that the divorce of the woman by her husband was obtained under fraud and compulsion used by Arshed Ali, and was not "voluntary." Assuming such finding to be correct, I nevertheless entertain considerable doubt whether a husband, who has divorced his wife even under compulsion, and registered such divorce according to law, is at liberty to prosecute the paramour of the woman divorced under section 498, I. P. C., without first taking steps to establish the continued subsistence of the conjugal union between himself and her. He cannot, I apprehend, thus ignore his own act, and repudiate it as extorted by fraud or force of his own will. The woman surely has some voice in the matter.

I know of no authority precisely in point, having seen no report of the case to which Mr. Dutt alludes, but think that the conviction under section 498, I. P. C., is bad also on this second ground, that, prior to the institution of the prosecution, the prosecutor had divorced the woman Yarjan, and could not at the date of such institution be deemed her husband for the purpose of preferring a complaint under section 498, I. P. C. The conviction under section 384, I. P. C., is to me wholly unintelligible. It is true that, if the divorce of Yarjan was procured by force or fraud, it may be correctly spoken of as extorted; but the extortion contemplated by sections 383 and 384, I. P. C., is that of some property or valuable security, or something susceptible of conversion into a valuable security.

Mr. Dutt acknowledges that Fazeemuddin delivered no property, unless his wife be deemed property, nor any valuable security. It can

not be seriously argued that a wife falls within the category of her husband's property, and Fazeemuddin executed no writing whatever, nor did he sign or seal anything capable of being converted into a valuable security. Hereafter divorced his wife, and then registered the divorce agreeably to Act 1., 1876 (B. C.) The conviction under section 384, I. P. C., is, I hold, erroneous, and the charge was unnecessary for the Deputy Magistrate, or at least the Magistrate might have inflicted an adequate sentence under section 342, I. P. C., alone.

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Judgment.

The judgment of the High Court (1) was as follows :—

We agree with the Sessions Judge that the conviction of Arshed Ali under sections 498 and 384 of the Indian Penal Code must be quashed as illegal. There is no evidence of facts which would constitute marriage under the Mahomedan Law. Mere statements of witnesses, that the complainant and Yarjan lived as husband and wife, is not sufficient. (See Full Bench decision in the matter of *Pitamber Singh*, 5 C. L. R. 597) It was necessary that the facts which would constitute marriage under the Mahomedan Law should have been proved in accordance with section 60 of the Evidence Act. We do not find any such evidence on the record.

As regards the conviction of extortion, it is not very clear what was extorted. It would appear from the explanation of the District Magistrate that, in his opinion, the accused was guilty of extorting a deed of divorce. The deed in question is not in the record, and we are therefore unable to say whether it comes within the definition of valuable security given in the Indian Penal Code. It has not therefore been established that any offence under section 384, Indian Penal Code, was committed by the accused.

We set aside the conviction and sentence of the accused under sections 498 and 384, Indian Penal Code. We do not interfere with the conviction under section 342, Indian Penal Code, which the Sessions Judge also thinks that there are no grounds to question.

The sentence under that conviction will therefore stand.

(1) MITTER and MACPHERSON, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF ANUND LAL {BERA AND } PETITIONERS;
 OTHERS
 AND
 EMPRESS

1883
 Aug. 2nd.
 No. 166 of
 1883.

*Penal Code (Act XLV. of 1860), section 183—Warrant, Resistance to execution
 of—Attachment, Resistance to—Act VII. (B. C.) of 1880.*

The accused were convicted, under section 182 of the Penal Code, of offering resistance to an attachment of certain property ordered by the Deputy Collector in execution of a certificate under the Public Demands Recovery Act, VII. (B. C.) of 1880. The warrant under which the attachment was made stated that the return should be made on or before the 3rd February, and the alleged resistance was offered on the 4th February 1883.

Held that the conviction was bad.

MOTION to show cause under section 439 of the Criminal Procedure why a conviction passed by the Deputy Magistrate

of Tomluk on the 6th April 1883, under section 183 of the Penal Code, and confirmed on appeal by the Sessions Judge on the 14th May, should not be set aside.

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 ANUND LAL
 BERA
 v.
 EMPRESS.
 Judgment.

The petitioners stated that, on the 22nd January 1883, one Tulsee Ram Bera was served with a notice from the Collector under Act VII. of 1880, section 10, whereby he was informed that the Collector had prepared a certificate for Rs. 14-12-3, being the arrears of revenue due from him; that by the notice Tulsee Ram was directed to show cause why, if the arrears were not paid within 30 days, the certificate should not be considered as a decree of Court, and executed against him; that, on the 27th January 1883, the Deputy Magistrate issued a perwana to the peon, Azim, directing him to attach the moveable properties of Tulsee Ram, and return the perwana before the 3rd February 1883, endorsing thereon the date of service or the cause of non-service; that the peon went with the certificate, and, not finding Tulsee Ram, put in a receipt signifying non-service on the 4th February 1883; that the peon went to execute the warrant on the 4th February 1883; that the peon preferred a complaint against the petitioners, alleging that they had obstructed and resisted him in his attempt to seize the outer door of Tulsee Ram's house; that the petitioners denied the charge *in toto*, and contended that the execution of the warrant was illegal; that the Deputy Magistrate on the 6th April convicted the petitioners under section 183 of the Indian Penal Code, and sentenced them each to pay a fine of Rs. 100, or in default to undergo rigorous imprisonment for one month each; that they appealed to the Sessions Judge, who dismissed the appeal on the 5th May 1883.

The petitioners prayed that the order of the Sessions Judge might be set aside on the following grounds, *viz.*, that the warrant being returnable on or before the 3rd February 1883, it remained alive till that date only; and that the warrant having expired on the 3rd February 1883, all proceedings taken thereunder were bad and void *ab initio*.

The High Court (MITTER and WILKINSON, JJ.); on the 11th July, issued the following rule:—

Let a rule issue calling upon the Magistrate to show

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cause why the conviction should not be set aside upon the ground that, on the date of the alleged occurrence of the offence, the perwana that had been issued was not in force.

Baboo *Jogesh Chunder Dey* and Baboo *Dwurkanath Mookerjee*,
for the Petitioners.

The judgment of the High Court (1) on the hearing of the rule was as follows:—

The petitioners were convicted, under section 183 of the Penal Code, of offering resistance to an attachment of the property of one Tulsee Ram Bera, which the Deputy Collector had ordered in execution of a certificate under the Public Demands Recovery Act (B. C.) of 1880. The warrant under which the peon acted stated that the return should be made on or before the 3rd February. The resistance, it has been found in the present case, was offered on the 4th February, and it is contended before us that, under such circumstances, no lawful order was in force, and consequently the prisoner had committed no offence. It appears to us that, having regard to the terms of the second clause of section 325 of the Code of Civil Procedure, this objection is fatal to this conviction, and that the conviction, therefore, must be set aside, and the fine, if paid, refunded.

(1) PRINSEP and TOTTENHAM, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF SHUMBHU NATH SARKAR, PETITIONER ;
AND
RAM KAMAL GUHA.

1883
Nov. 30th.

No. 206 of
1881.

*Penal Code (Act XLV. of 1860), section 441—Criminal Trespass—Annoyance—
Bench of Magistrates, Absence of member of—Irregularity.*

A built a hut on portion of certain disputed land to which he laid claim, and was, on the prosecution of another claimant to the land, convicted of criminal trespass under section 441 of the Penal Code.

Held that the conviction was bad, as, in erecting the hut, it was not the intention of the accused to annoy.

Per Curiam : Loss or injury would naturally cause annoyance, but not the kind of annoyance contemplated by section 441 of the Penal Code.

In a trial before a Bench originally constituted of a Stipendiary and two Honorary Magistrates, one of the latter, after, the commencement of the trial, was absent, and important evidence was recorded in his absence. On the following day he returned to Bench, and signed the final order convicting the accused.

Held that the conviction was bad on the ground of irregularity.

MOTION to set aside a conviction, passed by the Bench of Native Magistrates in Rajshahye, on the 28th August 1883.
The facts appear from the judgment of the High Court.

Baboo *Bhyrub Chunder Banerjea* and Baboo *Sirish Chunder Chowdhry*, for the Petitioner.

The judgment of the High Court (1) was as follows :—

We think that this conviction cannot be sustained. It appears that there was some dispute between the principals of the parties to this case regarding the possession of a small

(1) PRINSEP and TOTTENHAM, JJ.

1883

*In re*SHUMBHU
NATH SARKAR

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RAM KAMAL
GUHA.*Judgment.*

piece of land. On the one hand, Luchmiput Singh, represented by the complainant, states that he is in possession of the land on a title obtained by purchase. On the other hand, Ranee Brojo Soondari, represented by the accused, states that she has ejected Luchmiput, as having been in possession without any title and on his refusal to pay rent to her for this land, which is within her zemindary. The accused has built a hut on a portion of the land thus in dispute, and he has accordingly been convicted of criminal trespass. In our opinion the act of the accused, even if it were proved that the complainant was in possession, would not amount to criminal trespass; for, in erecting the hut, it was not his intention to annoy, nor was it such an annoyance committed by the accused as is contemplated by the law. The finding of the Magistrates is, that it is the annoyance which has been caused to the complainant that constitutes the offence. No doubt, any loss or injury would naturally cause annoyance; but this is not the kind of annoyance which, we think, is contemplated by the Penal Code. Then, again, there is another objection taken, which is also fatal to the conviction. It is, that the Bench, as originally constituted, consisted of a Stipendiary and two Honorary Magistrates. In the course of the trial, one of these Honorary Magistrates was absent, but the trial, nevertheless, proceeded. On the following day he resumed his seat, and, notwithstanding that a portion of the evidence—and a very important portion—was taken in his absence, he joined with the other magistrates in signing the order for the conviction of the accused. The Stipendiary Magistrate, in furnishing an explanation regarding this matter, seems to think that the temporary absence of the other Magistrate from the Bench was immaterial, because he says that, when he returned, he (the Stipendiary Magistrate) explained to him the purport of the evidence which had been taken in his absence. This evidence, moreover, is of four witnesses, who are witnesses to the possession asserted by the complainant, and therefore it was a most important part of the case of the prosecution. It may be that the Bench would have been properly constituted by the attendance of the Stipendiary and one Honorary Magistrate; but, inasmuch as the other

Honorary Magistrate had been also a member of the Bench, and, though absent during the taking of a very important portion of the evidence, afterwards joined in the proceedings, and took part in the discussion, which resulted in the conviction of the accused, we cannot but think that such a mode of trial has seriously prejudiced him. On this ground alone, we think that the conviction could not be sustained; but, as has already been pointed out, the act complained of constitutes no offence. The conviction will accordingly be set aside, and the fine, if paid, be returned.

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NATH SARKARv.
RAM KAMAL
GUHA.*Judgment.*

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[CRIMINAL JURISDICTION.]

1883
Aug. 13th.
No. 172 of
1883.

IN THE MATTER OF CHAKOWRI LALL . . . PETITIONER;
AND
MOTI KURMI AND OTHERS

Procedure in cross cases—Riot—Prosecutions for riot by rival sections—Examination of witnesses in cross criminal cases—Practice—Revision, Powers of the High Court as Court of—Criminal Procedure Code (Act X. of 1882), section 454.

Where a riot occurred, and complaints were lodged by both parties, the witnesses for the prosecution were in each case in turn examined-in-chief, then also in turn cross-examined, and in like manner re-examined, and the Court there upon discharged the accused in one case, and called upon the accused in the other to go into his defence :

Held that the procedure adopted was improper, and that there should be new trial.

Empress vs. Chandra Nath Sirkar, I. L. R., 7 Cal. 65, (S. C.) 8 C. L. R. 352, followed.

The provisions of section 439 of the Criminal Procedure Code in no way affects the powers of the High Court as a Court of revision vested in it by the High Courts Act.

IN this case two rules were obtained to show cause why certain proceedings of the Deputy Magistrate of Mozufferpore should not be set aside. The circumstances appear in the petition of Chakowri Lal, which was as follows:—

“That, for some time past, dispute was going on between your petitioner Chakowri Lal’s master, Rai Jung Bahadoor, and his brother on one side, and Rai Gooder Sahai on the other, for the use and possession of certain ijmal lands situated in mouzah Bokhera; and, on the 15th January last, the said Rai Gooder Sahai having attempted to take out earth from a plot of land, a likelihood of a breach of the peace was apprehended, and the police reported the matter to the Magistrate for binding down the said Rai Gooder Sahai to keep the peace, but nothing was done in the matter.

"That, on the 29th March last, the people of Rai Gooder Sahai again attempted to take out earth from the said plot, whereupon your petitioner, with three other servants of Rai Jung Bahadoor, went to the spot to protest against the action of the people of Rai Gooder Sahai; and, finding that the men were determined to go on, your petitioner went to the police outpost close by to give information.

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 In re
 CHAKOWRI
 LALL
 v.
 MOTI KURMI.
 —
 Statement.
 —

"That, in the meantime, the men of Rai Gooder Sahai, *vis.*, Hurdwar Ojha, Persid Pandey, Moti Kurmi, and Kutjhingoor Kurmi, who were armed with latties, attacked the other servants of Rai Jung Bahadoor who were waiting there, and, as they were running away to escape, they were surrounded a little way off by the men of Rai Gooder Sahai consisting of the above and a large number of others, whereupon the other servants of Rai Jung Bahadoor came to their rescue, and a riot took place at the spot, and some men on both sides were hurt and wounded.

"That your petitioner gave information at the police outpost close by of what had taken place, and one Raghunundun Singh on behalf of the said Rai Gooder Sahai also lodged complaint at the same outpost.

"That the said Raghunundun Singh in his complaint alleged that Thakur Ray had attempted to enter into the house of Ras Gooder Sahai, whereupon, they having been resisted, a riot took place, and the said Raghunundun further alleged that Rai Jung Bahadoor and his brother, Rai Barhind Bahadoor, with their men, had attacked the house of Rai Gooder Sahai with brick-bats, and had looted a store-house.

"That the police held an investigation, and reported that the case brought by your petitioner against Moti Kurmi and others was false, and the case brought by Raghunundun Singh against your petitioner was true. But, at the same time, caused a proceeding to be instituted against Gooder Sahai's other servants under section 147, &c., of the Indian Penal Code.

"That all these cases came to be tried by C. Steward, Esq., one of the Deputy Magistrates at Mozufferpore, *vis.* the case by your petitioner against Moti Kurmi, Kutjhingoor Kurmi, Ramdhyan Lall, Persid Pandey, Khub Lall, Mohabeer Lall, and

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Statement.

Dhami Rai; the case by Raghunundun Singh against your petitioner, Chakowri Lall, Moshohur Sahoo, Kapur Chand Sahoo, Mohun Baree, Sheo Kurmi, Dillah Doshad, and Gopee Doshad, and, thirdly, the case by the police against Hurdwar Ojha, Persid Pandey, and others.

"That the witnesses for the prosecution in the case by the police were first examined-in-chief, then the witnesses in your petitioner's case, and lastly, in Raghunundun's case; and, after the examination-in-chief in all these cases was over, the witnesses were cross-examined in the cases by Raghunundun Singh, Chakowri Lall, and the police in succession.

"That the said Deputy Magistrate then heard the arguments of the pleaders for the defence in the case by the police, and the arguments of the pleaders for the prosecution in the case by Chakowri Lall, but declined to hear the pleaders for the defence in the case by Raghunundun Singh.

"That, on the 25th day of June 1883, the said Deputy Magistrate, without recording any reasons whatever for his decision, discharged the defendants in the cases by the police and Chakowri Lall.

"That the Deputy Magistrate, without hearing the pleaders for the defence in Raghunundun's case, accepted the evidence for the prosecution in the said case as the rebutting evidence in your petitioner's case, and discharged the defendants in the case brought by your petitioner.

"That the said Deputy Magistrate has framed charges under sections 147 and 325, Indian Penal Code, against your petitioner and other defendants in the case by Raghunundun Singh, and the 15th day of July has been fixed for evidence of the witnesses for the defence.

"That the course adopted by the Deputy Magistrate is, as your petitioner is advised and submits, wholly illegal; and that it has vitiated the whole of his proceedings; and that the same should be annulled and quashed. That, under any circumstances, the two cases should not be heard or tried by the same officer.

"That your petitioner also submits that the said defendant in the case by your petitioner have been improperly discharged."

Jackson and Baboo *Saroda Churn Mitter* and Baboo *Grish Chunder Chowdhry*, for the petitioner.

Evans and Baboo *Aukhil Chunder Sen*, for the Opposite parties.

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Judgment.

The judgment of the High Court (1), which was as follows, was delivered by—

PRINSEP, J.—These two rules have been granted under the following circumstances: It appears that a riot occurred between two parties represented by Chakowri Lall and Raghunundun Singh, and a case was brought by each party representing the circumstances differently. These cases were tried before the same Deputy Magistrate of Tirhoot. The mode of trial adopted in both cases was exactly that described in the case in 8 C. L. R. 352, (S. C.) I. L. R., 7 Cal. 65, that is to say, the trials were held on what are termed "parallel lines," the witnesses for the prosecution in each case in turn were examined-in-chief, then followed their cross-examination also in each case in turn, and next such re-examination as was necessary. In the case in which Chakowri Lall was the complainant, the Deputy Magistrate discharged the accused. In the other case, the Deputy Magistrate found that the charge had been *prima facie* established, and he accordingly called upon the accused for their defence. In consequence of this, two applications were made to this Court, the object being to quash these proceedings, and to have fresh trials held.

It is unnecessary for us to explain in detail the exact grounds on which such proceedings are to be condemned as they are fully set forth in the judgment to which I have referred. It is much to be regretted that the Deputy Magistrate did not avoid the procedure, which was there condemned as improper and unfair to the parties under trial, although it possibly may have had the recommendation in his eyes of enabling him to arrive at a more speedy and satisfactory determination as to which was the party really in fault. But, however that may be, it is clear that, for reasons stated in the judgment above cited, this mode of trial is open to strong objections, and that it should therefore never be adopted. Each case

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should be separately tried, and the guilt or innocence of the accused determined on evidence recorded in it, and not on impressions obtained elsewhere on circumstances of a different character.

As regards the first case, *viz.*, that in which the accused have been discharged, although we disapprove of the mode of trial adopted, we think that there are no sufficient grounds for holding that there should be a fresh trial, or that there has been a failure of justice, such as requires our interference. It must not, however, be understood from our declining to interfere with the order of discharge that we, by any means, express any opinion regarding the guilt of the accused in the present case, or the correctness of the facts pleaded by either party. All that we desire to say is, that we think that there are no sufficient grounds for our directing the proceedings in that case to be re-opened. But, as regards the second case, that in which the petitioners, Chakowri Lall and others, have been put on their defence, we think that the accused have been seriously prejudiced; and that, from the opinion evidently formed by the Deputy Magistrate, and expressed in no doubtful terms, he has prejudged the case, so that the taking of a defence is practically only a matter of form. This result we cannot but attribute to the irregular manner in which the proceedings in this and the counter-case have been conducted. In these circumstances we think that, under section 526, the trial should be transferred to some other Criminal Court, and this no doubt will have the effect of rendering a fresh trial necessary. The case will accordingly be transferred to the District Magistrate who will be at liberty to try the case himself, or to transfer it to some other competent Magistrate. We were pressed in the course of the argument by Mr. Evans who appeared to oppose the rule to hold that, under the terms of section 439, the powers of this Court, as a Court of revision, are limited; but the Code of Criminal Procedure in no way affects the powers vested in this Court under the High Court Act, and we are not prepared to hold that section 439 in any way limits those powers.

We have also given full consideration to the argument that, *ex necessitate*, a Magistrate must try counter-cases, and thus

cannot often avoid forming an opinion regarding the merits of a case from proceedings already had in a previous case between the same parties in reversed positions. We desire to lay down no general rule to embarrass judicial officers, but only to declare that it is the duty of every Criminal Court to give the parties affected a fair trial, and we must rely on the sense of fairness and justice which should animate every Magistrate or Judge to avoid as much as possible being influenced by anything beyond the four corners of the evidence recorded in any particular case.

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[CRIMINAL REFERENCE.]

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 Aug. 23rd.
 —
 No. 101 of
 1883.

IN THE MATTER OF ROMANATH BAL . . . APPELLANT;
 AND
 BEHARI BAG BAGDI RESPONDENT.

*Criminal Procedure Code (Act X. of 1882), section 247—Dismissal of
 prosecution—Complainant, Absence of—"Present in Court."*

A case having been transferred from the file of one Magistrate to that of another was, on the day fixed, called on for hearing, but, the complainant not appearing, the case was dismissed under section 247 of the Criminal Procedure Code. It appeared that the complainant and his witnesses, though not in attendance in the Magistrate's Court, were present in another Court in the same Court-house, being under the impression that his case had been transferred to the Magistrate of that Court.

Held that the complainant having been present in the Court-house, the provisions of section 247 of the Code had been improperly applied.

REFERENCE submitted by the Magistrate of Howrah on the 2nd August 1883, under section 438 of the Criminal Procedure Code, for the opinion of the High Court.

The terms of the reference were as follow:—

"The Deputy Magistrate to whom the case was referred by me under section 192 of the Criminal Procedure Code having left the District, I transferred it to the file of another Deputy Magistrate (Babu Bunkim Chunder Chatterjee). The complainant did not appear before the Deputy Magistrate on the day of hearing, but appears to have been present in the Court-house on another floor, believing his case to have been on the file of a third Deputy Magistrate. The case was dismissed under section 247 of the Criminal Procedure Code, accused being acquitted.

"I do not think I have power to revive the case; but, as the complainant has certainly been injured by the order, his failure to appear being due to no fault of his own, I think the order should be set aside by competent authority, and the case revived."

The following was the explanation of the Deputy Magistrate:—

"With reference to your orders in the case calling for any remarks I may have to offer in regard to it, I have the honour to state that the case was called up on the day fixed for the hearing, but the complainant was not found, and the complaint was accordingly dismissed under section 247 of the Criminal Procedure Code. This happened about the middle of the day. Late in the day, towards four o'clock in the afternoon, I was informed by a mukhtar (not one retained in the case, so far as the record goes to show) that the complainant was in attendance in another Court held in another part of the building under the impression that the case was on the file of that Court. A little after I received from the Deputy Magistrate, Babu Gour Das Bysack (on whose file the case had been supposed to be), a report of the attendance of witnesses produced by the complainant, and presented to him. Clearly the complainant was entitled to have his case revived; but, as I had dismissed the complaint, and was not competent to revive it of my own authority, I recorded the circumstances as they had happened, for the benefit of the complainant, should he be inclined to take further proceeding in a superior Court."

Babu *Tarucknath Sen*, for the Accused.

The Judgment of the High Court (1), which was as follows, was delivered by—

PRINSEP, J.—This is a case under section 352 of the Indian Penal Code. The Deputy Magistrate, to whom the case was referred for trial by the District Magistrate of Howrah, left the station before the trial commenced. The District Magistrate thereupon transferred it to another Magistrate who, without any communication to the parties, called on the case on the day fixed by his predecessor for the trial. The complainant with his witnessess was in attendance in the Court-house on that date, but, not having been informed of the particular Court to which his case was transferred, he remained on the premises until the afternoon. The case was in the meantime called on, and the complainant not being present, it was dismissed under section 247. In the course of the afternoon the Deputy Magistrate received,

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from another Deputy Magistrate on whose file he states the case had been supposed to be, a report of the attendance of the complainant and his witnesses, and presented to him. The Deputy Magistrate then thought that, having passed an order under section 247, he could not revive the case, and he accordingly reported the matter to the District Magistrate. If the Deputy Magistrate, on obtaining this information had not yet signed his previous order, we think it was not too late for him to have re-called it, and corrected the evident error which had occurred. At any rate, it appears to us from the facts stated above that the provisions of section 247 had not been properly applied, for the complainant was present in Court, and therefore his case could not be properly dealt with under that section. Under such circumstances we direct that the trial do proceed.

[CRIMINAL APPELLATE JURISDICTION.]

NANHA MALLA APPELLANT;

AND

EMPRESS RESPONDENT.

1883
Aug. 31st.
—
No. 411 of
1883.*Criminal Procedure Code (Act X. of 1882), s. 288—Accomplice, Evidence of—
Approver, Evidence of—Conditional pardon.*

Quære: Whether the deposition of an approver taken before the committing Magistrate may be used in the Sessions Court as evidence against accomplices, the approver having retracted his former statement, and the conditional pardon having, in consequence, been withdrawn.

See *Foyudee Paramanick*, 7 C. L. R. 66.

APPEAL from a conviction and sentence passed by the Sessions Judge of Bhaugulpur, dated 28th June 1883.

The facts are fully stated in the judgment of the High Court (1), which was as follows:—

The deceased, a boy, who is the brother-in-law of the appellant, the appellant, and one Chulhai were bringing down some wood tied on to three boats lashed together. These boats were moored in a small stream when the attention of the Chowkidar was attracted by the appellant constantly walking backwards and forwards on the bank at about 3 *russies* from the boats. He crossed over and asked appellant why he was so walking about; and, on receiving no satisfactory reply, searched and, close by among the reeds, he found the dead body of the boy who had evidently been killed by some heavy weapon. The appellant and Chulhai then accused one another of the murder. A heavy axe with which the murder was evidently committed was found in the water near the boats. The conduct of the appellant shows that he either killed the boy himself or was concerned in the murder with Chulhai; for, if he were altogether innocent, it is impossible to suppose that he would not have at once denounced the murder.

(1) PRINSEP and TOTTENHAM, JJ.

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He was observed walking about nervously and without any apparent object on the bank close to where the body was lying, and there is, therefore, the strongest reason for concluding that he knew that the dead body of the boy was there. Even supposing that he did not know this, he must have noticed the sudden disappearance of the boy, and yet he clearly took no steps to discover what had become of him. Such conduct is altogether inconsistent with any hypothesis in favour of his innocence.

The next motive for the murder is not very clear. The prisoner says that he made over to the boy Rs. 88, which his master had left in his charge, and that Chulhai killed the boy, and took away the money; and that, when Chulhai threw the money into the water, he suspected him, and gave the alarm. But he gave no alarm at all; and it is impossible to believe that the money obtained by the murder should have been thrown away before the murder had become known, and therefore before there was any object for concealing or getting rid of evidence, unless there should have been some quarrel in its distribution; no money except Rs. 6 has been found.

Chulhai gave evidence, both before the Magistrate and the Sessions Court, under conditional pardon; but, as on the latter occasion he retracted and denied all that he had previously said, the Sessions Judge has cancelled the pardon, and directed proceedings to be taken against him. But the Sessions Judge, nevertheless, has, under section 288 of the Code of Criminal Procedure, admitted as evidence on the trial the statement made by Chulhai to the Magistrate in the presence of the prisoner.

As the prisoner is undefended before us, we find ourselves in the same position as another Bench of this Court in the case of *Joyudee Paramanick*, 7 Cal. L. R. 66, and have the same reluctance in determining whether this evidence was properly taken into consideration at the Sessions trial. We think that without definitively deciding this matter without the assistance of argument at the Bar, the evidence is of such a character that it cannot safely be relied upon. But, putting this aside, we think that there is ample evidence on the record for the conviction of the appellant Nanha, and we accordingly dismiss this appeal.

[CRIMINAL REFERENCE.]

IN THE MATTER OF R. DAVIS *v.* KOYLAS CHUNDER
GHOSE.

1883
Sep. 7th.

No. 218 of
1882.

Opium Act (I. of 1878), Breach of license to sell muddut under—Act IV. of 1866 sections 35, 36, 37, 39, and 40—Act II. (B. C.) of 1876—Excise Act (VII. of 1878)—Liability of master for servant's breach of opium license.

A, who held a certificate under Act VII. of 1878 (the Excise Act) from the Deputy Commissioner of Police that he was entitled to a license from the Collector to sell *muddut* upon the conditions set forth therein, obtained such a license from the Collector under Act I. of 1878 (the Opium Act) upon the conditions mentioned.

No license was granted by the Deputy Commissioner of Police, it not being usual for licenses to be granted by the Police where a license had been issued by the Collector upon a certificate from the Deputy Commissioner.

A was charged under section 40 of Act IV. of 1866 [as amended by Act II. (B. C.) of 1876], with a breach of the conditions, not of the license, but of the certificate, the act complained of having been committed by A's servant.

Held that the sale of *muddut* is regulated by Act I. of 1878, and therefore no license from the Commissioner of Police for the sale of *muddut* was requisite under sections 36 and 37 of Act IV. of 1866.

Held, further, that section 39 of Act IV. of 1866 applied to the case, and that, under that section, a license from the Deputy Commissioner of Police was necessary for the sale of *muddut*, and accordingly that A, although he had obtained a certificate from the Deputy Commissioner of Police, entitling him to a license under Act I. of 1878, was liable to punishment by reason of his not having, under section 39 of Act IV. of 1866, also obtained a certificate from the Deputy Commissioner.

See *In re Bhoobun Chunder Shaw*, 11 C. L. R. 464.

REFERENCE submitted, under section 432 of the Criminal Procedure Code, by the Officiating Chief Magistrate of Calcutta on the 27th August 1883 for the opinion of the High Court.

The reference arose out of a case in which the accused was charged by the Police, under section 40 of Act IV. of 1866, with

1883 having committed a breach of what was described as a Police license under Act IV. of 1866. The accused had, in fact, no license from the police, but he had a certificate from the Deputy Commissioner of Police of Calcutta certifying that he was entitled to a license from the Collector to sell *muddut* upon the conditions set forth in the certificate. A license was granted under Act I. of 1878 by the Collector upon these same conditions. No license, however, was granted by the Police, and it appears that it was not usual for licenses to be granted by the Police where a license was issued by the Collector under Act I. of 1878 upon a certificate from the Deputy Commissioner of Police.

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The alleged breach was actually committed by the servant of the accused, and the question which arose was, whether the accused was liable for his servant's act. He was not charged upon his license before the Collector, apparently because it was considered by the High Court that the master was not answerable for a breach committed by his servant of the conditions of a license granted by the Collector under Act I. of 1878. See *In re Bhoobun Chunder Shaw*, 11 C. L. R. 464.

The terms of the reference were as follow :—

“The accused, Koylas Chunder Ghose, was charged before me under section 40 of Act IV. of 1866 with having committed a breach of the 6th condition of what was described in the charge as his Police license granted under sections 36 and 37 of that Act by keeping his *muddut*-shop open, and effecting sales therein up to 9 P. M. on the 7th instant at No. 214, Bow Bazar Street.

“The so-called Police license is not actually a license, but a certificate granted by the Deputy Commissioner of Police. It purports to be granted under Act VII. (B. C.) of 1878 (the Bengal Excise Act.)

“The shop for which the license was granted was managed by the accused's servant, Aghore Chunder Mitter. The accused himself was not present in person on the day when it is charged that the shop was open up to 9 o'clock. The shop was kept open by Aghore Chunder, and the *muddut* was also sold by him.

"The section of Act IV. of 1866 [amended by section 40 of Act II. (B. C.) of 1876], under which this prosecution has been instituted, is as follows: 'Any person committing a breach of any of the conditions which, in accordance with section 37 of this Act, are included in a license granted under the Bengal Excise Act, 1878, or of any of the conditions, subject to which a license is given under section 39 of this Act, shall, on summary conviction before a Magistrate, be liable to a fine not exceeding one hundred rupees, and such fine shall be recovered from the person licensed, notwithstanding that such breach may have been caused by the default or carelessness of the servant or other person in charge of the shop or place of sale.

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"Any person so convicted shall also be liable to the forfeiture of his license at the discretion of the Commissioner of Police subject to the direction and control of the said Lieutenant-Governor.'

"It has been held that, under the Opium Act, I. of 1878, the master is not responsible for the acts of his servant—see *In the matter of Bhoobun Chunder Shaw* (11 C. L. R. 464); and if this prosecution had been under that Act, I should have been bound to follow that ruling, and acquit the accused.

"By section 11 of the Excise Act, VII. (B.C.) of 1878, no person shall sell any exciseable article without a license from the Collector; under section 4 "exciseable article" includes "spirited and fermented liquors and intoxicating drugs," as defined by that Act; and "intoxicating drugs" include "gunja, bhang or sidhee, charus; every preparation and admixture of any of the above, and any other intoxicating drug which the Local Government may from time to time declare to be included in this definition." So far as I have been able to ascertain, no declaration has been made under this section by the Local Government.

"Under Rule 10 of the Rules, dated 6th May 1879, made under the Opium Act, however, intoxicating drugs include *muddut* and *chundoo*; and, under Rule 32 of the same Rules, "no person shall retail opium, intoxicating drugs, or poppy heads except under license from the Collector." In this case

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the accused held a license from the Collector to sell *muddut*, which is an intoxicating drug under the first rule quoted. *Mudaut* is not, however, an intoxicating drug within the definition in the Excise Act, and therefore it seems to me not an exciseable article.

“Sections 36 and 37 of Act IV. of 1866 are as follow :—

“36. ‘No license shall be granted under the provisions of Act XI. of 1849 (for securing the Abkaree Revenue of Calcutta), unless the person applying for such license shall produce a certificate from the Commissioner of Police stating that a license may be granted to him for the sale of spirituous liquor or intoxicating drugs, as the case may be, without risk or detriment to the preservation of peace and good order, and containing a full statement of such conditions as may have been imposed and shall have remained in force under the provisions hereinafter contained at the date when such license shall be granted. No license so granted shall be renewable without a fresh certificate as aforesaid previously obtained from the Commissioner of Police, subject to the order and control of the Lieutenant-Governor of Bengal.’

“37. ‘It shall be competent to the Commissioner of Police, subject to the direction and control of the said Lieutenant-Governor, to limit in such certificate as aforesaid the periods for which the license may be granted. and also to fix such conditions as he may deem necessary for securing the good behaviour of the keepers of the houses and places of entertainment as aforesaid, and for the prevention of drunkenness and disorder among the persons frequenting or using the same, and from time to time to vary such conditions subject to such direction and control as aforesaid; and no license granted under the said Act XI. of 1849 shall be valid unless it shall contain such conditions as shall have been imposed and shall remain in force for the time being under this section.’

“Act XI. of 1849 has been repealed by Act VII. (B. C.) of 1878, which, however, provides (sec. 3, para. 4) that references to the repealed Act are to be taken as made to the repealing Act.

“The certificate which the accused held from the Deputy

Commissioner of Police was a certificate certifying that a license may be granted under the provisions of Act VII. of 1878 (for securing the Abkaree Revenue of Calcutta) without risk or detriment to the preservation of peace and good order * * * * * 'subject to the conditions mentioned on the reverse (which have received the sanction of the Honourable the Lieutenant-Governor of Bengal) or any other conditions that may be ordered hereafter.'

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"The 6th condition on the reverse is: 'That he shall not open his shop or effect sales therein before 6 A. M., nor keep it open or effect sales therein after 4 P. M.; and that he shall not harbour any person whatsoever within his shop except such persons (if any) as shall habitually reside therein as his servants or as part of his family before or after those hours respectively.' That 6th condition is embodied as the 6th condition in the license granted by the Collector.

"Now section 40 of Act IV. of 1866, as amended by section 12 of Act II. (B. C.) of 1876, under which the present charge is made, provides for a penalty for breach of 'any of the conditions which, in accordance with section 37 of this Act (IV. of 1866), are included in the license granted under the Bengal Excise Act, 1878.' It has no reference, it seems to me, to a certificate granted by the Commissioner. In this case the certificate is treated as if it were the license itself, and not merely a certificate stating that a license embodying the conditions set out therein by the Collector may be granted. Moreover the only license which the accused holds is a license granted, it seems to me, not under the Excise Act (for *muddut* is not an intoxicating drug within the definition in that Act, and therefore not an exciseable article), but under the Rule 32 of the Rules dated 6th May 1879, made under the Opium Act; and, as I have already pointed out, according to the case of *Bhoobun Chunder Shaw*, 11 C. L. R. 464, the accused is not liable for the act of his servant for a breach of such a license. But, assuming that *muddut* is an intoxicating drug within the meaning of the Excise Act, as it is within the rules under the Opium Act, it is clear that it cannot be sold under either Act without a license from the Collector. It cannot be sold under the mere certificate from the Commissioner of Police

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"In my opinion the accused cannot be charged, under section 40 of Act IV. of 1866, with a breach of the conditions in his certificate, where that breach has been committed by his servant, and not by himself.

"The question is one of great importance. If I am right in my opinion, it will be practically impossible for the Police to control *muddut*-shops in Calcutta. I have deemed it right, therefore, to refer the matter for the opinion of the High Court on the following points:—

"(1.) Whether *muddut* is an intoxicating drug within the meaning of section 3 of the Excise Act, 1878.

"(2.) Whether a license can be granted under that Act by the Collector for the sale of *muddut*.

"(3.) Whether, under section 40 of Act IV. of 1866, a charge will lie against the accused for a breach of the 6th condition set out in the certificate from the Deputy Commissioner, the acts complained of being the acts of his servant, and the condition in question being embodied in the license granted by the Collector.

"I send the original certificate and license for the inspection of the Honourable the High Court."

The judgment of the High Court (1) was as follows:—

It appears to us from the facts as laid before us by the pleader who represents Government that the case has not been properly represented by the Presidency Magistrate. In the reference made by him it is stated that the accused has been charged, under section 40 of Act IV. (B. C.) of 1866, "with having committed a breach of the 6th condition of what was described in the charge as his Police license granted under sections 36 and 37 of that Act, by keeping his *muddut*-shop open, and effecting sales therein up to 9 P. M. on the 7th instant at No. 214 Bow Bazar Street."

It appears that the law, as it stands at present, does not require any certificate from the Commissioner of Police under sections 36 and 37, Act IV. (B. C.) of 1866. The sale of *muddut* is regulated by Act I. of 1878 of the Legislative Council of India, it being provided by that Act that the words "in-

toxicating drugs," whenever they occur in Act XI. of 1849 and in the Bengal Act II. of 1876, shall not include opium; and opium is defined by Act I. of 1878 to include *muddut*. Therefore any license granted for the sale of '*muddut*' will not be a license under sections 36 and 37. Section 39, Act IV. (B. C.) of 1866, applies to the present case, under which a license from the Commissioner of Police is necessary for the sale of *muddut*, that being an article for which no license is now required under Act XI. of 1849, or the Acts which stand in its place. Having so far, as we can learn, obtained no such license under section 39, the accused Koylas Chunder Ghose apparently would be liable to punishment under section 35 of that Act.

The case will be returned to the Presidency Magistrate.

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[CRIMINAL APPELLATE JURISDICTION.]

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 ANOTHER
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Criminal Procedure Code (Act X. of 1882), sections 289, 292, 303, 342—Reply, Right of prosecutor to—Reference to Books of Science—Experts, evidence of—Fury, Procedure in case of verdict of, not being unanimous—Presumption from fact of accused not calling evidence—Cross-examination.

Per Curiam : Although the strict interpretation of sections 289 and 292 of the Criminal Procedure Code warrants the construction that a prosecutor is entitled to reply where the accused has stated, when asked under the former section, that he means to adduce evidence, but on consideration does not do so, yet this was never contemplated by the Legislature, the object of the law being merely to allow each side an opportunity of commenting on the evidence of the other.

A Court will exercise a wise discretion in allowing a well-known treatise, such as Taylor on Medical Jurisprudence, to be referred to in cases depending upon medical evidence.—See *Hatim*, 12 C. L. R. 86.

In a trial by jury upon charges of culpable homicide not amounting to murder under section 304, and voluntarily causing grievous hurt under section 325, of the Indian Penal Code, where the Sessions Judge, in summing up, clearly contemplated a conviction on the first charge, the jury after a short retirement stated that they were unanimous for an acquittal on the first charge, but were divided on the other charge. The Judge, thereupon, inquired what the ma-

majority was, and, on being informed that it was 3 to 2, asked what the verdict of the majority was. The answer was "guilty;" and the Judge at once accepted the verdict.

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Held that it was not intended that, under section 303 of the Criminal Procedure Code, a Judge, on ascertaining that a jury was not unanimous, should make enquiries to learn the nature of the majority and its opinion, so that he should have an opportunity of accepting or refusing that opinion as a verdict according as it coincided with his own opinion or not.

Where, on being asked under section 289 of the Criminal Procedure Code, an accused has stated that he means to adduce evidence, but on further consideration does not do so, the Court is not at liberty to draw a presumption adverse to the accused from the circumstance that he has not adduced evidence.

It is not competent to the Court, under section 342 of the Criminal Procedure Code, to subject the accused to cross-examination, [see *In re Hossain Buksh Sheikh*, 1. L. R., 6 Cal. 96; (S. C.) 6 C. L. R. 527; *In re Noor Bux Kazi*, 1. L. R., 6 Cal. 279; (S. C.) 7 C. L. R. 385; *Empress vs. Behari Lal Bose*, 6 C. L. R. 431.]

APPEAL from a conviction and sentence passed by the District Judge of Hooghly.

Amir Ali and Baboo *Taruknath Sen*, for the Appellants.

J. D. White, Officiating Deputy Legal Remembrancer, for the Respondent.

The judgment of the High Court (1) was as follows :—

The two appellants before us, Hurry Churn Chuckerbutty and Gopal Chundra Chuckerbutty, gomashtas of two co-sharer zemindars, have been tried on charges of culpable homicide not amounting to murder under section 304 of the Indian Penal Code, voluntarily causing grievous hurt under section 325, and voluntarily causing hurt under section 323. The Jury unanimously acquitted them of the offence of culpable homicide not amounting to murder; and, by a majority of 3 to 2, convicted them on the second charge. The Judge, in accepting this verdict, expressed his disapproval of the acquittal on the first charge; but, in view of the unanimity of the Jury in respect of that acquit-

(1) PRINSEP and TOTTENHAM, JJ.

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tal, accepted the verdict under both heads, and accordingly sentenced the prisoners to the extreme sentence of imprisonment allowed by the law, and also inflicted a fine.

There are many objections which have been taken to, and are indeed patent in, the Judge's proceedings, both as regards those during the trial, and his summing-up to the Jury.

It appears that, at the close of the evidence for the prosecution, and before rising for the day, the Sessions Judge inquired and learnt from the attorney for the accused that he meant to adduce evidence for the defence. When the trial was resumed on the following day, the attorney intimated that, upon re-consideration, he did not intend to adduce any evidence. On this the Sessions Judge apparently informed him that the prosecutor would, nevertheless, have the right of reply; and, on its being claimed in spite of an objection raised, he conceded it.

Now, no doubt the strict interpretation of the terms of sections 289, 292 would warrant this, but we think that this was never contemplated by the Legislature, and certainly should not have been allowed by the Judge, when, in fact, no evidence was produced for the defence. The object of the law evidently is to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor, simply because the pleaders for a prisoner may, after consultation during an adjournment, have had an opportunity of considering what was best for the interests of their client. The incautious reply of the attorney at the end of the day should not have prejudiced his client on the resumption of the trial, and can properly be regarded only as the expression of an intention then entertained subject to further consideration. Then, again, we think that, when the attorney for the defence wished to read such a well-known book as Taylor on Medical Jurisprudence, on a point so obscurely and unsatisfactorily determined by the medical evidence in this case, the Sessions Judge would have exercised a wise discretion if he had allowed a reference to that book to be laid before the Court. The case relied upon by the attorney in 12 C. L. R. 86 is an authority for referring to such a treatise; and, although it may be that, in an unreported case, a single

Judge, sitting on the original side of the Court, may have held an opinion to the contrary, we think that, in accordance with the usual practice, the Judge should have followed rather the reported case, especially as it had been decided by a Bench of two Judges. Next we regret extremely to find that, in spite of repeated judgments of this Court on appeal against orders passed by this Sessions Judge, he should still persist in the practice of conducting what is nothing else but a cross-examination of the prisoners. Section 342 of the Code of 1882 requires a Sessions Judge to put such questions to an accused generally on the case as he considers necessary after the witnesses for the prosecution have been examined; but that is to be done only for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. Now, in the present case, we find a very long cross-examination of the prisoner, Hurry Churn Chuckerbutty. The questions are so put as to extend over the entire transaction relating to the present case; and, more than that, they are so directed as to obtain from him answers on matters really irrelevant to the matters in issue, but calculated seriously to prejudice him before the jury, and also to incriminate the co-accused, Gopal Chundra, by connecting him with the execution of the decree which forms the foundation of the present case. Many of the questions are certainly what we should expect to find from a Counsel cross-examining an adverse witness. For instance, the accused was asked how was Jadub hurt? Answer: "How can I say." Question: "Are you of opinion then that Behary got Jadub hurt?" Answer: "No!" Question: "If neither you nor Behary was instrumental in getting him hurt, while the Doctor maintains that Jadub was wounded severely how then came he to be hurt?" Answer: "That I do not know." Question: "Why does the pleader say that he saw you, the peadah, and Jadub go to his lodging?" Answer: "He is Behary Sen's pleader, at the instance of Behary he says so." Then again the Judge asks many questions which are extremely irrelevant. Question: "After the deceased was brought to the Court, did you pay his diet-money, or was the amount of decree realized?" Answer: "He was neither sent to the jail, nor was

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the amount realized." Question: "If he was not sent to the jail, and at the same time the amount of the decree was not realized, then tell me what followed?" Such questions are not, in our opinion, questions which are contemplated by the law "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" The tenor of the questions is clearly to entangle the accused, and so to prejudice him with the Jury.

Lastly, the manner in which the verdict was taken is, in our opinion, objectionable. The summing-up of the Judge, to which reference will presently be made, clearly contemplates a conviction for culpable homicide, and it was so understood by all the members of the Jury except the foreman; for they informed the Judge that they thought that they had only to consider this charge. This necessitated a further explanation from the Session's Judge. The Jury then, after a short retirement, came back and said that they were unanimous on the first charge, but not on others, their verdict on the first charge being one of acquittal. The Judge thereupon asked: "How are you divided on the charge of grievous hurt?" Answer: "We are 3 to 2 on both the remaining charges." Question: "What is the verdict of the majority on the charge of grievous hurt?" Answer: "Guilty." Judge: "I need not therefore take your verdict on the remaining charge." Now, section 301 declares that, when the Jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority. Section 302 says: "If the Jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the Jury may deliver their verdict, although they are not unanimous." Section 303 no doubt empowers the Judge to ask the Jury "such questions as are necessary to ascertain what their verdict is;" but it was never in our opinion contemplated that, on ascertaining that the Jury were not unanimous, the Judge should make minute enquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict, according as it coincides with his own opinion or not.

The manner in which the Judge has acted on the present occasion raises much doubt in our minds whether that was not the motive for the course he took; and inclines us to think that, if he had been told that the verdict of the majority was for acquittal on those charges, he would not have accepted it. If we are wrong in concluding this, we think that we are almost bound to express our opinion on the matter, so as to prevent any misconception regarding what we consider to be the proper practice. Whatever may have been the individual opinion of the Judge in this matter, if he went so far as to ask the Jury what was the exact majority, and what was the opinion of the majority, we think that he ought to have received that verdict without hesitation; and, if he differed from it, he should have proceeded as directed by section 307. If the jury, in the present instance, had been required to retire without having informed the Judge as to the exact result of their deliberations, it is quite possible that, on further discussion, what was the majority might have become the minority, and we think that, in all fairness to the prisoners, the course indicated by us should be followed.

It next becomes necessary to consider the nature of the charge made by the Judge to the Jury. The general impression left by such a charge cannot be other than a plainful impression that it is rather an address of the Counsel for the prosecution than a fair and impartial summing-up of the evidence for and against the prisoner. None of the weak points in the evidence for the prosecution have been mentioned to the jury; and many important considerations and inconsistencies have been entirely overlooked. One point in the case, and a most material point, seems to have been altogether misapprehended by the Judge; and this, notwithstanding that it was prominently brought to his notice by the attorney for the defence when the case had closed. The point in question is the exact time at which the deceased was found by his relative Adori, and taken to her house, and the time of his death. This is an extremely important point, because, from the unusual character of the injuries from which the deceased is said to have died, it would seem doubtful, on the medical evidence as recorded, whether the

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ribs were broken before or after death. Although the medical officer states his opinion that these injuries were caused during life, he also intimates that they were recent; and, if it had been pointed out to him (as it ought to have been) that it was alleged that these injuries were inflicted eight days before death, it is not improbable that he would have modified his opinion, both as to the time at which they had been caused, and as to their having occasioned the death of the deceased. The woman, Adori, is very positive in stating that she found the deceased lying under the sal tree on Monday, the 4th Bysack. We find that this date was also stated in her examination in the Magistrate's Court, given within about ten days from the death, so that, at that time at least, whatever may have happened in the interval before the Sessions trial, her memory was probably clear. In the Sessions Court too, she not only repeats that statement, but gives reasons for fixing the date. It is quite possible, as the Sessions Judge remarks in his charge to the Jury, that she has made a mistake; and that, when she says the 4th of Bysack or 16th April, she must have meant the 18th of April, the medical evidence showing that the deceased must have died on the 19th; but this discrepancy was never properly laid before the Jury. It is a most important allegation for the defence that the ribs were broken after death, for the interval between the assault and death would go very far to weaken the medical evidence given without knowledge of the fact that the beating was administered some eight days before the death. Then, again, supposing, as the Judge intimated to the Jury, that the woman did make a mistake, and that she really meant 18th when she said 16th of April, there was a previous interval certainly of two, if not more, days during which the movements of the deceased are altogether unexplained. The Judge has cursorily endeavoured to explain this away by referring to the evidence of Adori that, during this time, the deceased was at Jehanabad; but, even supposing that the deceased had stated to her that he had been kept at Jehanabad, it was the duty of the Judge to put it more prominently to the Jury so as to enable them to determine what weight was due to it. There are other very important

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points in the medical evidence, to which reference might be made, which have been similarly overlooked or misapprehended by the Sessions Judge in his charge to the Jury. At all events, with such evidence before him, given by a comparatively inexperienced medical officer, it is much to be regretted that the Sessions Judge, having present in his Court the Civil Surgeon, did not think fit to examine him as an expert regarding the value of the testimony of his subordinate. But not only are the details of the Judge's charge to the Jury and the manner in which he has presented the evidence to them objectionable, but the manner in which he has presented the entire case in its different parts, is, in our opinion, one which cannot but have seriously prejudiced the prisoner under trial. Before laying the evidence before the Jury in detail, he asks the Jury to consider whether, having regard to the previous relations between the deceased and the prisoners arising out of previous litigations, the accused were not likely to have committed the offence charged. This was certainly reversing the order in which such matters are usually laid before a Jury. It is the practice of our Courts, first of all, to lay before the Jury the direct evidence against the prisoners, and then to tell them that, in determining the value of that evidence, they should consider the evidence of the motive which is attributed as the cause of the offence. In presenting the case in the manner in which he has done, the Sessions Judge cannot but have seriously prejudiced the accused, because they are represented as decidedly inimical to the deceased, and therefore as *prima facie* guilty. As the Judge puts it: "This is important as supplying a possible motive for the subsequent treatment of the deceased as deposed to in the evidence." There are also several parts of the evidence which materially affect the appellants now before us, which have not been laid before the Jury; for instance, the evidence of the pleader describing what the deceased said when he was being brought under arrest to the Civil Court. In explaining to the pleader the treatment he had received, the deceased nowhere mentioned the prisoner, Gopal, as one of those who had been concerned in the assault. The Sessions Judge, however, has altogether overlooked this

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point which was of very great importance to the prisoner Gopal. Next, in dealing with the evidence of Bhootnath Adhicari and Kedar Bagdi, the Sessions Judge pointed out that "Bhootnath Adhicari speaks from the point of the beating of "the deceased under the eaves of his house, and Kedar from "the point of deceased being brought to the bank of his own "tank." The Sessions Judge adds: "I need not refer to the "evidence of these witnesses at length." Now, if we refer to the evidence of these two witnesses, it is to be found that the one man, Bhootnath, says that, when he arrived, he saw the deceased laying under the eaves of his house; and that neither then, nor at any other time, did he see the deceased beaten, although he saw him removed thence to the tank, and on to the chowkidar's house in the village. Kedar, on the other hand, speaks to beating on the bank of that tank, and also to the further carrying-off of the deceased. Kedar's evidence therefore, so far as regards the beating at the tank, is inconsistent with that of Bhootnath. As regards the taking of the deceased in a dooly to the Civil Court, the case of the prosecution is that that was necessary in consequence of the severe beating that he had received, while for the defence it is alleged that the infirm state of health of the deceased prevented his walking to Jehanabad, a distance of 5 coss. The Judge in reference to this point says: "The next stage of the case is the acknowledged "hiring of a dooly to take the deceased to Jehanabad, as he "could not walk." "This is acknowledged even by the "defence." This was hardly a fair way of putting this part of the case to the Jury. Then the return that the peon made of the arrest of the deceased on the 14th of April mentions the fact that he was taken in a dooly. The Judge in referring to this matter states: It is to be observed that the return "itself mentions that the man had to be brought in a dooly;" but at the same time he omits to suggest to the Jury, and leave it for their consideration as he should have done, whether it was likely, if a severe beating had been administered, as stated by the prosecution that the peon would have mentioned the fact of the deceased being carried in a dooly to corroborate, as it were, any complaint that might be made of such ill-treatment by himself.

Another very important part of the case seems to have escaped proper attention. The deceased was brought under arrest to the Civil Court at Jehanabad on the 13th or 14th of April. The prisoner Hurry Churn Chuckerbutty, in his first examination before the Magistrate, stated that the deceased had compromised the decree against him by executing a kubooliut in his favour, which was registered on the same date. No enquiry was made in the Registration Office regarding what took place on this occasion. The Judge seems to have thought it sufficient to comment on the position of the men who were witnesses to the registration, and to have made the Registrar's endorsement on the document a means of explaining the movements of the deceased, between the 14th of April, the date of the presentation of the document for registration, and the 16th, when, the registration being completed, the document was returned. The Judge has assumed, merely from these proceedings, that the deceased remained all this time at Jehanabad with the prisoners. It is quite possible that this may have been the case; but, in the absence of evidence on this point, it was not a fair presumption for it is quite as likely that, if the gomashta desired to obtain the kubooliut after its registration, he should have attained this end by getting from Jadub, the executant of the deed, what is called the ticket or receipt of the Registration Office, a production of which would entitle the holder to obtain the document after its registration. Mr. Amir Ali, who appeared for the appellants, next objects, and we think with good reason, that, in laying the evidence in this case before the Jury, if the defence did not have an opportunity to cross-examine two witnesses who had been examined in the Magistrate's Court, and had deposed in favour of the prisoners, it was the duty of the Sessions Judge at least to notice this matter for consideration by the Jury.

We would next remind the Sessions Judge that, in the case of *Dhunno Kazi*, 10 C. L. R. 151, (S. C.) 1 L. R., 8 Cal. 121, which was an appeal from his own decision, as well as in a more recent appeal, two Division Benches of this Court have pointed out to him that the prisoner or his Counsel is at liberty to offer evidence or not as he thinks proper, and no inference unfavourable to him

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can be drawn, because he takes one course rather than another. Notwithstanding this instruction, the Sessions Judge has taken to task the accused, or those who conducted the case for them, for having at one time stated that they meant to adduce evidence, and having, on a subsequent occasion, stated that they had changed their minds, and intended to offer no evidence. The Judge says on this part of the case that, the accused not having called such witnesses, "you" that is the Jury, "are entitled to "presume that they did not contradict the prosecution as to "this." It was, however, entirely open to the defence to adduce no evidence at all, but to rely upon the evidence of the witnesses for the prosecution: and certainly in this case there was room for forming two opinions. The Judge next states: "The only "parts of the prosecution-story which are denied are, what in- "criminate the accused, the trespass into the house, the drag- "ging-out and beating, the carrying-off, the meeting with the "pleader." But all these, "if not true, are capable of contradic- "tion; and the accused had witnesses in attendance for some such "purpose, yet they did not call a single one." He also comments on the fact that amongst these witnesses were present the Civil Surgeon and the Deputy Magistrate himself, who were not examined. Our regret has already been expressed that the Sessions Judge, in the exercise of his discretion in this case, did not, for the ends of justice, examine the Civil Surgeon. His evidence would have been important as an expert to test the evidence of the Assistant Surgeon. The reason for which the Deputy Magistrate was called is not apparent. However that may be, the Judge was not at liberty to draw a presumption, adverse to the accused, from the circumstance that these witnesses were not examined. For these reasons we think that there have been serious misdirections in this case by the Judge to the Jury, which have caused a failure of justice; and that the prisoners must be re-tried on the charge on which they have been convicted.

The proceedings in the Sessions Court of Hooghly are accordingly hereby set aside; and the appellants may be at large on bail pending re-trial.

Lastly, having regard to the very strong opinion which the

Sessions Judge of Hooghly entertains in this case, we think it desirable that the new trial should be held by some other officer, and we accordingly direct that the case be tried by the Sessions Judge of the 24-Pergunahs.

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[CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF EMPRESS *vs.* PARMANUND AND OTHERS.

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No. 1180 of
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*Criminal Procedure Code (Act X. of 1882), sections 30, 34, and 209—Special powers
—Jurisdiction.*

In a trial before a Deputy Commissioner invested with special powers under section 30 of the Criminal Procedure Code, the accused was charged with culpable homicide not amounting to murder under section 304 of the Indian Penal Code, and there was some evidence which would, if believed, have supported a charge of murder, but the Court did not consider that evidence sufficiently strong to warrant such a charge, and proceeded to try the case as upon a charge under section 304 of the Penal Code only.

Held that section 209 empowering a Magistrate holding an inquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed, it was impossible to say that the Court had acted without jurisdiction, merely because there was some evidence which, if believed, would substantiate a charge of murder, an offence beyond his jurisdiction.

REFERENCE submitted by the Officiating Judge of the Assam Valley District under section 43⁸ of the Code of Criminal Procedure for the orders of the High Court in a case which had been dealt with by the Deputy Commissioner of Sibsagar in the exercise of the special powers conferred upon him under section 34 of the Criminal Procedure Code.

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The terms of the Reference were as follow:—

“The accused in this case were charged with culpable homicide not amounting to murder, under section 304 of the Indian Penal Code, and with causing the disappearance of evidence of an offence under section 201 of the same Code. The evidence shows that the deceased Mihiram met his death at the hands of the accused No. 1 Paramananda, and that accused Nos. 2 and 3, Samdele and Bamdele, were also present. It is also shown that accused No. 1, Paramananda, and his brothers next day caused the body to be buried, and spread a report that the deceased had died of cholera.

“The story told by accused No. 1, which the Deputy Commissioner appears to have believed, is that he was awake in the middle of the night while sleeping in his house by something touching his legs; that he got up, procured a light, and then saw the figure of a man disappearing through his door; he followed up the supposed thief, and overtook him at the house of the witness Dhani where he attacked him with blows and kicks, and dragged him along by the hair of his head. The deceased was then taken by the three brothers towards the house of the accused, but left on the way outside the house of Mussammat Palambi, a relative of theirs, they having found that he was dead. The majority of the witnesses corroborate this story, and allege that accused No. 1, while beating the deceased, charged him with the theft of a lota from his house; but Somdele, accused No. 2, called as his witness a man named Sonai or Sonaram, who alleged that, on the day previous to the occurrence, there had been a *mel* or assembly of villagers at Dhani's house where the deceased was staying to consider the matter of a report spread by the deceased that there had been an intrigue between Dhani's daughter Patima and (apparently)

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the accused Somdele and that accused No. 1, who was present at the *mel*, had used threatening language to the deceased, saying, "If you live to-night you will live; if you die, you will die."

As the Deputy Commissioner in his judgment remarks: "The Court at once saw that, if this statement was correct, the accused should be charged with murder, and not culpable homicide, for it must have been a deliberately planned affair."

Accordingly, the previous witnesses were re-called, and others were summoned by the Court, and questioned as to the alleged *mel*. Except the witness Doyaram, none of them support the story told by Sonai, and the persons said to have been present and concerned in the *mel* deny that any such assembly was held, or that there was any defamation of the accused by Mihi-ram. The accused Somdele himself, however, insists that a *mel* actually occurred, though his brothers, Paramanunda and Bamdele, were not, he says, present.

The Court, it will be seen, considered it proved that the deceased came to his death at the hands of accused No. 1 and his brothers, and that some offence was committed in the killing, though it did not consider that the evidence in regard to the *mel* was sufficiently strong to warrant a charge of murder. Under these circumstances, it appears to me that the case should not have been dealt with by the Deputy Commissioner in the exercise of his special powers under section 34, but committed for trial by the Sessions Court. I beg to refer to the orders passed by the High Court (JACKSON and TOTTENHAM, JJ.) on the 24th November 1879, in a somewhat similar case (*Kunja Behari Guha*), which had been disposed of by the Deputy Commissioner of Goalpara under section 36 of Act X. of 1872. The Honourable Judges there said:—

"It appears to us clear that this is a case in which the special power provided by section 36 of the Code of Criminal Procedure is not properly applicable. The offence with which the accused were charged in this case was an offence punishable by death, that is to say, they were charged with the murder of the deceased Batal. It will entirely depend upon the credit to be given to the evidence for the prosecution, and also upon the medical evidence and the conclusions to be properly

drawn from that evidence, whether the offence committed by the accused, if any, was really murder or an offence of a less degree; and that can only be ascertained properly by the Court having full jurisdiction, that is to say, the Court of Session, which in the District of Assam tries with the aid of a jury." The Court accordingly in that case annulled the conviction held by the Deputy Commissioner, and directed that the accused should be committed for trial before the Court of the Sessions Judge.

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In the present case the accused are, it is true, not charged with murder, but there is, as already pointed out by the Deputy Commissioner, some evidence of deliberation, which, if believed, would aggravate the offence, and possibly raise it to the category of murder, and it appears to me that following the principles laid down in the case quoted above, the prisoners should have been committed for trial by the Sessions Court.

I would therefore suggest that the conviction should be annulled, and the Deputy Commissioner directed to commit the case for trial by the Sessions Court."

The judgment of the High Court (1) upon the reference was as follows:—

The prisoner has been convicted under section 304 of the Penal Code by an officer invested with the special powers described in sections 30, 34, Code of Criminal Procedure. The Sessions Judge, to whom the sentence has been submitted for confirmation, has referred the case to this Court as a Court of Revision, to have these proceedings set aside, and the Deputy Commissioner directed to commit the case for trial in his Court. Section 209 empowers a Magistrate holding an enquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed. This is the course which we understand the Deputy Commissioner has taken, and we can not therefore hold that it is not authorized by law, or that he has acted without jurisdiction, merely because there is some evidence which, if believed, would substantiate the charge of murder, an offence beyond his jurisdiction. At the same time we think that this course should very rarely, if ever, be taken by

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any officer invested with special powers under sections 30 and 34 of the Code of Criminal Procedure, and that in adopting it any such officer incurs a very grave responsibility. Looking to the evidence on the record, especially the medical evidence, we are not inclined to doubt the correctness of the finding of the Deputy Commissioner, and therefore we are unable to set aside the proceedings. The Sessions Judge will, therefore, proceed according to law.

[CRIMINAL REFERENCE.]

IN THE MATTER OF GOVINDO DASS *vs.* DULAL DASS
AND OTHERS.

1883
Sept. 6th.

No. 117 of
1883.

Criminal Procedure Code (Act X. of 1882), section 259—Absence of complainant—Dismissal of warrant case.

A Magistrate is not competent to dismiss a warrant case, which is not compoundable, because of the absence of the complainant.

REFERENCE submitted, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Rungpore on the 23rd August 1883.

The terms of the reference were as follow :—

The case was one of extortion, and the Magistrate dismissed it for non-appearance of complainant on the day of hearing. This is not allowable under section 259 of the Criminal Procedure Code, as the case was not a compoundable one.

I append the Magistrate's explanation; though I agree with him that the Code is defective in this point, I submit that it should nevertheless be followed. If we are to have a com-

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plicated legal procedure, we should stick to it, and not try to improve it by our own devices, absurd as it may be. I note in this case that, though the 23rd July was the first day fixed for hearing, no order was passed till the 24th. This may have contributed to induce the complainant to believe that he need not be over punctual in his attendance.

The judgment of the High Court (1) was as follows:—

We think that the Magistrate was not competent in this case—a warrant case not compoundable—to dismiss it, because the complainant was absent.

It appears that, on the day first fixed for the trial, the complainant attended with his witnesses, but, in consequence of the inability of the accused, a Police Officer, to attend, it was postponed, the complainant and witnesses being bound over to attend on the day to which the trial had been postponed. On that day the accused alone appeared, and the Magistrate dismissed the case. Having regard to the terms of section 259, we are of opinion that, in warrant cases not coming within that section (except under the last clause of section 253 which is not applicable), a Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant. The Magistrate should, in the case before us, have admitted the accused to trial; and, as the complainant and his witnesses had given recognizances for their appearance, he should have enforced their attendance.

The case must therefore be tried.

(1) PRINSEP and O'KINEALY, JJ.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF OBHOY CHUNDRA. MUKERJEE *vs.*
MAHOMED SABIR.

1883
Oct. 2nd.

No. 243 of
1883.

Breach of the peace—Disputes as to land—Jurisdiction—Criminal Procedure Code (Act X. of 1882), section 145.

Before instituting proceedings under section 145 of the Code of Criminal Procedure, it is the duty of the Magistrate to satisfy himself that there is a dispute likely to cause a breach of the peace concerning the land.

Per PIGOT, J.—Magistrates ought to be very careful in acting under section 145 of the Code of Criminal Procedure, so as to guard themselves from the danger of assuming jurisdiction in cases not really contemplated by the section, where the suggested apprehension of a breach of the peace is little more than colourable, and made to induce the Court to deal with matters properly cognizable by the Civil Courts.

THIS was a motion to set aside an order passed by the Deputy Magistrate of Barisal on the 16th day of July 1883.

The circumstances under which the order complained against was made are set out in the judgment of MITTER, J.

Bell, for the Petitioner.

C. Gregory, *contra*.

The following judgments were delivered by the High Court (1):—

MITTER, J.—I am of opinion that the basis on which the jurisdiction of Criminal Courts under section 145 of the Code of Criminal Procedure is founded does not exist in this case. MITTER, J.

Section 145 says that, whenever a Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, &c., &c., then a proceeding under this section may be instituted.

In this case what happened was this: A police report was submitted to the Magistrate on the 8th November 1882,

(1) MITTER and PIGOT, JJ.

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and in that report the police officer stated as his opinion that there was a dispute between the parties to these proceedings relating to a chur, and that, in his opinion, there was a likelihood of a breach of the peace. This opinion was based upon this ground: The police officer says that, if one of the parties would attempt to collect rent jointly from the ryots, there was a likelihood of a breach of the peace. Upon that, both the parties to these proceedings were called upon to show cause why they should not be bound down to keep the peace. They appeared and asked the Magistrate to allow them time to settle the matter amicably. For some reason or other this amicable settlement did not take place, and they were directed to enter into recognizances to the amount of Rs. 500 each not to commit a breach of the peace for four months.

Then on the 15th Pous 1289, corresponding with the 29th December 1882, an application was made by Mahomed Sabir, the opposite party, alleging that the applicant before us, *viz.*, Obhoy Chundra Mukerjee, was about to commit acts of oppression upon his tenants, and in that application, Mahomed Sabir also stated that some of the tenants had complained against the servants of Obhoy Chundra. On that very day his deposition was taken, and he confirmed the statements made in his application. The Magistrate, without any further inquiry as to whether all these statements were correct or not, on the 2nd January 1883, upon this petition and the deposition of Mahomed Sabir, ordered the proceeding now before us to be instituted.

It appears to me that it was the duty of the Magistrate to see whether there was any dispute likely to cause a breach of the peace concerning this chur land, before instituting these proceedings. He has acted simply on the statement of Mahomed Sabir, that is to say, he has assumed jurisdiction without really satisfying himself as to whether there was a dispute between the parties. It may be that Mahomed Sabir was anxious to have the question of possession decided in a cheap way; but it was the duty of the Magistrate under section 145 to satisfy himself that really there was a dispute likely to cause a breach of the peace concerning this chur land.

On the whole I am of opinion that the foundation upon which the jurisdiction of the Criminal Courts under section 145 is based was wanting in this case. We therefore set aside the order, dated 16th July 1883, and the rest of the proceedings.

. PIGOT, J.—I entirely agree. I only wish to add that it seems to me that Magistrates ought to be very careful in acting under section 145 of the Code of Criminal Procedure, so as to guard themselves from the danger of assuming jurisdiction in cases not really contemplated by the section, and where the suggested apprehension of a breach of the peace is little more than colourable, and made to induce the Magistrates to deal with matters properly cognizable by the Civil Courts.

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TABLE OF CASES REPORTED.

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2. Ashu Tosh (F. B.) 3 C. L. R. 270.
3. Bura Hangesh (P. C.) 3 C. L. R. 197.
4. Gopimohan (F. B.) 4 C. L. R. 309.
5. Kassim Khan (F. B.) 8 C. L. R. 300.
6. Keshub Mahajan (F. B.) 11 C. L. R. 241.
7. Nobin Chunder (F. B.) 4 C. L. R. 243.
8. Pitambar (F. B.) 5 C. L. R. 597.

[PRIVY COUNCIL.]

THE QUEEN ; . APPELLANT; June 5th.

AND

BURA HANGSEH AND BOOK SINGH RESPONDENTS.

Legislative Councils, Powers of—Plenary Powers of Legislation—Delegation—Jurisdiction—24 and 25 Vic., Cap. 67—24 and 25 Vic., Cap. 104, secs. 9, 11—28 Vic., Cap. 15—Letters Patent of 1865—Act XXII. of 1869.

The Statutes 24 and 25 Vic., c. 104, 28 Vic., c. 15, and the Letters Patent of 1865, expressly contemplate and authorize such an exercise of legislative authority by the Governor-General of India in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta. Act XXII. of 1869 was, therefore, in its general scope, within the legislative power of the Governor-General in Council.

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

When a question arises whether the prescribed limits have been exceeded, the established Courts of Justice must of necessity determine that question; and the only way in which they can properly do so; is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would be included any act of Parliament at

[CRIMINAL.]

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variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

When plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised either absolutely or conditionally; and the Indian Legislature has power to legislate conditionally on the use of particular powers, or on the exercise of a limited discretion by a person in whom it places confidence.

The Governor-General in Council could not, by any form of enactment, create in India, and arm with legislative authority, a new legislative power, not created or authorized by the Councils Act; but nothing of that kind has been done or attempted in Act XXII. of 1869.

APPEAL from a decision passed by a Full Bench of the High Court of Judicature at Calcutta, which will be found reported in the first volume of the Calcutta Law Reports, page 161, and in the Indian Law Reports, Calcutta series, vol. 3, p. 63.

Sir *James Stephen*, Q. C., and *Graham* for the Appellant.

J. B. Norton, *Raikes*, and *Eardley Norton* for the Respondent.

The facts of the case and the arguments will be found set out in the reports abovementioned, and in the following judgment of their Lordships of the Privy Council (1), which was delivered by—

LORD
 SELBORNE.

LORD SELBORNE:—

This appeal has been brought under the following circumstances: In the year 1869, the Indian Legislature passed an Act (No. XXII. of 1869), purporting, *first*, to remove a district called the Garo Hills from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of Revenue constituted by the Regulations of the Bengal Code and the Acts passed by any Legislature then or theretofore established in British India, and from the law prescribed for such courts and offices by such Regulations and Acts; and, *secondly*, to vest the administration of civil and criminal justice, within the same territory

(1) Lord SELBORNE, Sir JAMES W. COLVILLE, Sir BARNES PRACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

in such officers as the Lieutenant-Governor of Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of Bengal should, by notification in the *Calcutta Gazette*, direct. By the 9th section, the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections, to the Jaintia Hills, the Naga Hills, and such portion of the Khasi Hills as might, for the time being, form part of British India," being, as their Lordships understand, a mountainous district, conterminous towards the east with the Garo Hills.

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The Lieutenant-Governor of Bengal, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the Garo Hills; and afterwards, by another notification published in the *Calcutta Gazette*, on the 14th October 1871, he extended all its provisions to the district of the Khasi and Jaintia Hills, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor, and adding that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Upon this Act and these notifications, one Bura (the respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy Commissioner of the Khasi and Jaintia Hills upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd April 1876, the sentence was commuted by the Chief Commissioner of Assam to transportation for life. On the

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9th July 1876, they presented a petition of appeal to the High Court at Calcutta; and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings, with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of Bengal to extend the Act of 1869 to the Khasi and Jaintia Hills, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, *viz.* (1), that the Act of 1869, did not, according to its true construction, exclude the jurisdiction of the High Court as to the Garo Hills, and, therefore, could not do so as to the Kashi and Jaintia Hills, assuming them to have been brought within its operation; and (2) that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not section 9 only, was void and *ultra vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at Calcutta; but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the junior counsel for the respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition that the 4th section of Act XXII. of 1869 purports to remove the Garo Hills, not from the jurisdiction of the High Court, established by Her Majesty's Letters Patent under the authority of Imperial Statutes, but only from that of the local Courts, constituted by the Regulations of the Bengal Code, or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of Bengal), substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature" mentioned in the 4th section of the Act of 1869, were only the Courts of Original Jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that, under the terms of the 8th and 9th sections of the High Court's Act (24 and 25 Vict., cap. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December 1865), under which the Calcutta High Court is constituted, appeals might have gone to that Court from Criminal Tribunals of first instance, established by the Lieutenant-Governor of Bengal in the Garo or the Khasi and Jaintia Hills, if Act XXII. of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorizes the Lieutenant-Governor to appoint Tribunals, not of first instance only, but also of "Reference and Appeal;" and by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of Assam, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

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The next question is, whether the whole Act of 1869 is void. It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 and 25 Vict., cap. 104), which passed in the same Session with the Indian Councils Act; and because, by section 22 of the Indian Councils Act (24 and 25 Vict., cap. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending or altering any laws or regulations whatever, now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal, or in any way affect any

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of the provisions of any Act passed in this present Session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions, expressed in the Act, apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 and 25 Vict., cap. 104.

Now, it appears to their Lordships from the express terms of the Act, 24 and 25 Vict., cap. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories, by the High Courts, was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by Letters Patent, "to erect and establish a High Court of Judicature for the Bengal division of the Presidency of Fort William," and others at Madras and Bombay. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several Presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 and 29 Vict., cap. 15). But, as some argument was founded on the 18th, it may be fit here to observe that by that section Her Majesty was empowered to make orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts;" and that the same power was, in substance, conferred upon the Governor-General of India in Council (not in his legislative, but in his executive, capacity) by the repealing Act of 1865.

The 9th section of 24 and 25 Vict., cap. 104, expressly says that each of the High Courts shall, within its own Presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her Letters Patent, grant and direct;" and that, "save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," the High Court in each Presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by section 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's Letters Patent) is here distinctly recognized.

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The 11th section is similar in effect. It enacts that, after the establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of India, which had been applicable to the Supreme Courts of Bengal, Madras, and Bombay, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the Letters Patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the Calcutta Letters Patent of the 28th December 1865 were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the Letters Patent of the 28th December 1865 (clause 44), it is "ordained and declared that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the Statute 24 and 25 Vict., cap. 104, or of the Letters Patent issued under that Statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council, as might remove

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any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorized both by those Statutes and by the Letters Patent themselves. Their Lordships, under these circumstances, agree with the High Court that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council; and they are, therefore, brought to the consideration of the more limited question whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice MARKBY, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges, between the power conferred upon the Lieutenant-Governor of Bengal, by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act or any part of it shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation, which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may, with quite as much reason, be called incomplete as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation, on the part of the external authority so trusted, to enlarge the area within which a law actually in operation is to be applied, it would seem *a fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the

majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it,) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

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Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this: The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by, and responsible to, the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place, and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative author-

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ity, "in the other territories subject to his government." The Legislature determined that so far a certain change should take place; but that it was expedient to leave the time and the manner of carrying it into effect to the discretion of the Lieutenant-Governor; and also that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws and every part of them could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the Garo Hills, what was done as to the Khasi and Jaintia Hills? The Legislature decided that it was fit and proper that the adjoining district of the Khasi and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the Garo Hills, not necessarily and at all events, but if, and when, the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is directly and immediately, under and by virtue of this Act (No. XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may, in their Lordships' judgment, be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the

Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it, from time to time, conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII. of 1859, XXIII. of 1861, and XXV. of 1891).

By section 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories not subject to the general regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity) "or by the Local Government to which such territory is subordinate, and notified in the *Gazette*." Section 445, in the Code of Criminal Procedure, is precisely similar, and by section 39 of Act XXIII. of 1861, when any such extension as that authorized by section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must, therefore as (Sir RICHARD GARTH well observed), be presumed to have been known to, and in the view of, the Imperial Parliament, when the Councils Act of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

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Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

[FULL BENCH.]

IN THE MATTER OF ASHUTOSH CHUCKERBUTTY

• AND OTHERS (*Convicts*).1878.
July 15th.*Confession of an Accomplice—Accomplice—Evidence Act, section 30—Court—Jury—Joint Trial—Corroborative Evidence.*

Under section 30 of the Evidence Act, the confession of a prisoner, which affects himself and some other prisoner tried for the same offence at the same time, becomes, when duly proved, admissible in evidence as against both prisoners, and must be dealt with by the Court.

Where A and B are being jointly tried for the same offence, and the only evidence against B is the confession of A, B should be acquitted, as his conviction upon such evidence would be illegal.

The word "Court" in section 30 of the Evidence Act means the Court before which the trial of the prisoner is to be had, and in a Jury trial, means the Judge and Jury.

Per JACKSON, MARKBY, AINSLIE and McDONELL, JJ.—The corroborative evidence which, coupled with the confession of an alleged accomplice, would be sufficient to sustain the conviction of a prisoner, must be such as would itself, if believed, be sufficient for conviction.

Per GARTH, C.J.—How far any corroborative evidence would be sufficient, coupled with the confession of an accomplice, to convict a prisoner, must depend upon the circumstances of each particular case, and is a question for the Judge who tries it.

CRIMINAL REFERENCE to a full Bench from Mr. Justice McDONELL and Mr. Justice BROUGHTON. The terms of the reference are as follow :—

The three prisoners have been convicted by the additional Sessions Judge of the 24-Pergunnahs of murder, and have been sentenced to death, and the proceedings have been sent up to this Court for confirmation of the sentence, under section 287 of the Criminal Procedure Code. The prisoners have likewise appealed.

With reference to the prisoners Baneswar and Akbar, it was argued before us that the evidence on the record was not legally sufficient to convict them of the offence charged; that the so-called confession and statement of Ashutosh was not legally

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admissible as evidence against the other two; and that the Judge had erréd in law, and had misdirected the jury when he put before them Ashutosh's confession, and told them they might take it into consideration as against the other two prisoners. Various rulings on section 30 of Act I. of 1872 have been pointed out to us. (*R. vs. Malapa bin Kapana*, 11 Bom. H. C. R. 196; *R. vs. Mohesh Biswas*, 19 W. R., Crim., 16; *R. vs. Jaffir Ali*, 19 W. R., Crim., 57; *R. vs. Belat Ali Moonshee*, 19 W. R., Crim., 67; *R. vs. Sadu Mundul*, 21 W. R., Crim., 69; *R. vs. Naga*, 23 W. R., Crim., 24; *R. vs. Chunder Bhattacharjee*, 27 W. R., Crim., 42; *R. vs. Keshub Bhoonia*, 25 W. R., 8; *R. vs. Baijoo Chowdhree*, 25 W. R. Crim., 43; *R. vs. Narain Teli*—(MARKBY and MORRIS, 77.)—May 27th, 1875.) In these decisions it has been held that such confessions are of little weight unless they are corroborated by other testimony; that they have all the infirmity that attaches to the evidence of an accomplice; in fact, that they are of less weight as they are not given on oath, and the party making them is not subject to cross-examination; it has further been held (*R. vs. Chunder Bhattacharjee*, 24 W. R., Crim., 42) that they cannot be used as the basis of a case, but merely as corroborative of other independent evidence.

In some of the decisions *R. vs. Naga*, 23 W. R., Crim., 24; *R. vs. Chunder Bhattacharjee*, 24 W. R., Crim., 42), it has been pointed out that the Legislature have avoided calling the statement "evidence," and finally it has been held, in the case of *Narain Teli and others*, 27th May 1875, decided by MARKBY and MORRIS, 77., that the statement (in a case tried by a jury), should not be put before the jury; that the word "Court" in section 30 means only the Judge, and not the jury; and that, not being "evidence" as defined in section 3 of the Evidence Act, the jury ought not to be allowed to take into consideration the confession of one prisoner as against his fellow-prisoners.

With the last decision, as at present advised, we do not agree. We think that, if a confession is to be used at all, it must be used by the Tribunal which is to deal with the case, that is to say, by the Judge and jury when the trial is by Judge and jury, and by Judge and Assessors where that mode of trial is adopted; and that the word "Court" must therefore mean the Tribunal, what-

ever that Tribunal may be. Again, if it is to be used at all, it cannot, we think, be used as anything else, but as evidence. We agree, however, in thinking with the learned Judges who have decided the other cases that it is material of the very lowest order and of far less force than the evidence of an accomplice, which itself ought to be accepted only under most exceptional circumstances without corroboration, inasmuch as the confession is made without oath or affirmation, and the person making it is not subject to cross-examination.

It appears to us that there is some conflict of opinion as to whether such confessions, when used against others, only stand in need of corroboration, or whether, as ruled in the 24 W. R., Crim., 42 (with which decision we concur, differing, as it seems to us that it does, from the course taken in others of the cases we have referred to), that such confession cannot be used as the basis of a case, but merely as corroborative of other independent evidence.

The questions we would wish the Full Bench to consider are:—

1. Whether a confession made by one person, who is being tried jointly with others for the same offence, and affecting himself and some other such person (and which is proved), is to be treated as "evidence" against such other person under section 30 of Act I. of 1872; or whether "the words the Court may take into consideration such confession," &c, to the end of the section, mean that such confession is to be treated, not as "evidence," but in some other manner, and, if so, in what manner should such confession be treated?

2. Whether the word "Court," as used in that section, means the Judge only in a trial by a Judge with a jury, or includes both Judge and Jury.

3. Whether such a confession, made by one such person, may be used as the basis of proof of the offence charged as against the other, and, if corroborated, may sustain a conviction; or whether it is necessary, in order to sustain a conviction, to use such confession only as itself corroborative of other independent evidence?

Baboo *Bhoirub Chunder Bannerjee* for the accused.

Kilby for the Prosecution.

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Reference.

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BUTTY.

Judgment.

GARTH, C.J.

The following judgments were delivered by the Full Bench (1):—

GARTH, C.J.:—

I am of opinion that, under section 30, the confession of a prisoner, which affects himself and some other prisoner charged with the same offence, becomes, when duly proved, admissible in evidence as against both prisoners, and must be so dealt with by the Court.

When this confession has been *duly proved*, it may, by the express language of the section, be taken into consideration against either prisoner; and I do not see in what other way it can be taken into consideration than as evidence. There is no provision in the section by which the confession is to be receivable against one prisoner in one way, and against the other prisoner in another way.

But, although the section does, in my opinion, make the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence, and the question, whether, taken by itself, it is sufficient in point of law to justify a conviction, is a question for the Judge who tries the case.

A confession by prisoner A, which involves the guilt of prisoner B, is, of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or affirmation, and I am of opinion that no Court ought to convict prisoner B upon such evidence.

I consider, moreover, that, if a prisoner were convicted upon such evidence, whether by a Jury or otherwise, and were to appeal to this Court, the conviction ought to be set aside; and, further, that any Sessions Judge, trying such a case before a Jury, ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case.

I consider that the word "Court" must mean the Court before which the trial of the prisoner is to be had, and, in a Jury trial, must mean the Judge and Jury. I cannot think that the word

(1) GARTH, C.J., JACKSON, MARKBY, AINSLIE, and McDONELL, JJ.

‘Court’ is intended to mean “the Judge and Jury,” as regards one portion of the confession, and the Judge only, exclusive of the Jury, as regards the other portion.

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If the confession is corroborated by other evidence, I do not think it matters whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. The course of proof in each case is a question of convenience for the prosecution; and they have a right to bring forward the evidence in any order they may think fit.

JACKSON, J.:—

JACKSON, J.

In my opinion, the confession spoken of in section 30 of the Evidence Act—to put the intention of the Legislature into a common English legal phrase—“is evidence.” I also think it evidence for a Jury at a Sessions trial in India, but I think at the same time it is not singly sufficient to support a conviction; that is to say, an accused person other than he who has confessed, cannot lawfully be convicted upon such confession alone, nor, in my opinion, ought he to be convicted on the ground of such confession corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction.

In considering such questions as these, it appears to me that embarrassment and difficulty will be greatly lessened if, instead of assuming the English law of evidence, and then enquiring what changes the Evidence Act has made in it, we regard, as I think we are bound to do, the Act itself as containing the scheme of the law, the principles, and the application of those principles to the cases of most frequent occurrence.

It may be that, as observed by Mr. Norton in his preface (Law of Evidence, 8th Edition), the framer of the Act overestimated what had been done when he claimed to have reproduced within the compass of his 167 sections the whole of Taylor’s work that was applicable to India, and there can be no doubt that cases must arise for which no positive solution can be found in the Act itself; and in such cases we shall, probably be justified, and shall always be safe, in adopting English rules in so far as they follow, or are in accord with, the general lines of

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the Act. But in respect of matters expressly provided for in the Act, we must, so to say, start from the Act, and not deal with it as a mere modification of the law of evidence prevailing in England.

The Legislature, in my opinion, has not avoided calling the confession of an accused person "evidence" against a co-prisoner. It has not so called it, because that is not the phraseology of the Act. What its framers appear to have had chiefly in view, and what they have expressed in the way which they considered most suitable, was, *first*, what facts are relevant and what irrelevant for the purpose of producing a given belief; and, *second*, in what manner such facts as are relevant are to be proved. The definition or explanation of the expression "proved" is: "A fact is said to be proved when, after considering the circumstances before it, the Court either believes it to exist," &c.

It seems to follow, therefore, that, if a relevant fact is proved, and the law expressly authorizes its being taken into consideration, that is, considered for a certain purpose, or against persons in a certain situation, the fact in question is "evidence" for that purpose, or against such persons, although the result has not been expressed in those words by the Legislature; and being "evidence," it must be used in the same way as everything else that is "evidence."

What the Legislature intended to denote whenever the word "evidence" is used in the Act, is carefully explained in the interpretation-clause.

A confession is an admission, and, by section 21, admissions are relevant. Ordinarily, such admissions can only be proved against the person making them, and therefore, if the prosecutor at a trial before the Court of Session proved a confession made by a person then under trial, the Court would be obliged to hold that it was relevant, and could be considered only against the person making it; but the 30th section expressly says that such confession, when proved, may be considered as against other persons, being jointly tried for the same offence, who are affected by it. The first point, therefore, seems made out by the terms of the Act itself.

In truth, it seems impossible to avoid in such cases producing an effect upon the mind, when a confession is read, extending

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to every person named in the confession; even the Judge, with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing prisoner to be in the main veracious. It may be, therefore, that the Legislature did wisely in recognizing and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognized.

The confession, being thus what is called "evidence," is, it seems to me, clearly a matter for the Jury to consider. So far as I can call to mind, the only mention of a Jury in the Evidence Act occurs in section 166, which prescribes how questions may be put by Jurors. But certainly neither in that Act nor in the Code of Criminal Procedure is there, so far as I am aware, any trace of an intention to separate evidence which may be considered by a Jury from that which may be considered by a Court.

Nor, in my opinion, does the definition of the word "Court," in the Evidence Act, exclude the Jury; it runs thus: "Court includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence;" but it does not, therefore, necessarily exclude a jury, for when a definition is intended to be exclusive, it would seem the form of words (as in the next following definition) is "means and includes."

Besides, it appears to me that, for the purposes of the definition, the Jury are authorized with the Judge to take evidence. They certainly hear it, and decide upon its value.

As to the language of section 255 of Act X. of 1872, the word "evidence" there is not, I think, used with reference to its definition in the Evidence Act; and even if it were, I do not consider that it would create any difficulty.

It seems to me impossible to conceive that the Legislature should have intended that confessions admitted to consideration under such circumstances should be used in any other way than by making them (to use the English term again) "evidence;" or that, having made them "evidence," and having contemporaneously provided for the trial of a large class of offences by a Jury invested with the power of determining questions of

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fact, they should have silently *withdrawn* such "evidence" from the consideration of the Jury, permitting it to be considered by the Court, which has not the function of deciding on the facts.

Judgment.

JACKSON, J. There remains the question of the effect to be given to such confessions, and this point also appears to me not doubtful.

The confession clearly cannot stand higher as to probative force than the testimony of an accomplice, who is declared to be a competent witness against an accused person (section 133); and the law does not say of the confession as it says of such testimony, that "a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." That being so, I consider that we are free to lay down the rule which would undoubtedly prevail in England if it were possible that such matter could be admitted, and to hold that a conviction based upon such confession, alone would be illegal; and not only so, but that such confession will not legally suffice when corroborated by other facts of which evidence is offered, unless those facts are such that, if believed to exist, they would of themselves suffice to support a conviction.

I need hardly advert to the fact, that the Legislature, while declaring that a conviction is not illegal because it depends on the uncorroborated testimony of an accomplice, at the same time enumerates examples of facts which the Court may presume, mentioning prominently this one, that an accomplice is unworthy of credit unless he is corroborated in material particulars; and the facts afterwards instanced as fit to be considered for the purpose of limiting the application of this maxim have reference, I conceive, only to the case of accomplice-witnesses, as the illustration (b) [to section 113 of the Evidence Act] itself has also. I would answer the questions put as above stated.

MARKBY, J. MARKBY, J. :—

Upon a question of the construction of an Act of Legislature it is very desirable that there should be no dissentient opinion. My learned brethren having come to the conclusion that a conviction by a Jury, upon the uncorroborated confession of an accomplice, would, except as against the accused person wh

makes the statement, be illegal, I am content to abandon my own doubts and to concur in their decision, that the confession of an accomplice is, by the law of India, evidence against his fellow-prisoner.

AINSLIE, J.:—

Courts of Justice, in dealing with questions of fact, have to determine whether the alleged facts are proved, disproved, or not proved. They can only do this by considering the matters before them bearing upon the existence or non-existence of the alleged facts, and whatever goes to show the existence or non-existence of a fact is evidence in respect of that fact.

The Indian Evidence Act, in the 30th section, speaks of certain confessions by a prisoner as proper to be taken into consideration, not only as against the person by whom they are made, but also as against any other person who is being tried jointly for the same offence. Such confessions may legally go to make up the proof of the offence as against the latter, and, if so, it is impossible to describe them as anything but evidence. In the case of a confession proved by oral testimony, or previously reduced to writing by a Magistrate, and proved by the production of the record, the definition of "evidence" in section 3 of the Evidence Act will clearly include such proof. There can be no reason for holding that a confession made during a trial in the Court of Session in open Court is to be treated as something different; therefore, I hold that all confessions which can legally be used under section 30 are evidence.

In the case of trial by Jury, it is specially the province of the Jury to determine whether the evidence before it, adduced to prove the charges laid against the accused, is trustworthy. It is the duty of the Judge to exclude irrelevant evidence; but as regards the evidence which is decided to be relevant, it is the duty of the Jury to determine on its credibility, and generally its sufficiency.

If a case is left to go to a Jury at all, the whole of the admissible evidence must go to the Jury, and therefore the word "Court" in section 30 must include the Jurors who are to determine on the evidence. But under section 251, Criminal Proce-

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Code, a Sessions Judge is empowered to stop a case without referring the evidence to the Jury when he thinks there are no grounds for proceeding, and to direct the Jury to return a verdict of acquittal.

Judgment.

ALINSLIE, J. To a certain extent, therefore, the Judge is to determine on the sufficiency of the evidence, and he is empowered to direct a Jury to return a verdict of acquittal when there is no evidence to go to it except the uncorroborated statement of a confessing fellow-prisoner under trial at the same time. I think that he is not only empowered, but bound to exercise this power. The case does not come within the words of section 133, taken strictly; and that section itself must be taken with illustration (b), section 114, which shows that it is reasonable to presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The particular materials, as has frequently been pointed out, are those which go to connect the accused with the offence, and not merely those which go to corroborate the general story of the crime. There is not, in my opinion, anything in the law inconsistent with the view, that a Sessions Judge is bound to stop a trial when there is nothing against an accused person but an uncorroborated statement of a fellow-prisoner being jointly tried for the same offence; and that a failure to do this amounts to an error in law, which will vitiate a conviction by a Jury arrived at under such circumstances.

MCDONNELLY. McDONELL, J. :—

On the first and second points I agree with my learned brethren. I took the same view when referring the case to the Full Bench. On the third point, I entirely concur in the judgment of Mr. Justice JACKSON.

[FULL BENCH.]

EMPRESS

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1879
March 26th.

Recognizance, Forfeiture of—Criminal Procedure Code, Act X. of 1872, section 502.

According to the fair construction of section 502 of the Code of Criminal Procedure, a Magistrate is not justified in forfeiting a recognizance to keep the peace under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued.

THIS was a case referred to the High Court under section 296 of Act X. of 1872 by the Sessions Judge of Dacca, regarding an order passed by the Deputy Magistrate of Moonsheegunge.

The order was made under the following circumstances: In September 1877, Nobin Chunder Dutt and Krishna Coomar Dutt were required to enter into their recognizances, in the sum of Rupees 500 each, to keep the peace for a year. Before this term had expired, it was found, in two cases which came before the Magistrate, that a breach of the peace had been committed in a dispute between their respective servants and retainers. It was further found that, though neither Nobin Chunder Dutt nor Krishna Coomar Dutt had personally taken any part in the disturbance, both were interested in the subject of dispute; but it was also proved that the retainers of the latter had acted merely in self-defence.

The Magistrate thereupon issued a notice to Nobin Chunder to show cause why his recognizance should not be forfeited, but, subsequently, without examining the witnesses for the defence, declared the recognizance to be forfeited under section 502 of the Criminal Procedure Code.

The Sessions Judge, however, considered this order to be illegal on two grounds: firstly, because no breach of the conditions of the recognizance had been proved by any evidence admissible against Nobin Chunder Dutt; and, secondly, because, although a notice

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was issued on him to show cause, the Deputy Magistrate appears to have forfeited the recognizance without summoning the witnesses whom Nobin Chunder wished to call in his defence. Accordingly, he referred the matter to the High Court. .

Reference.

The case came before Mr. Justice AINSLIE and Mr. Justice BROUGHTON, but their Lordships were of opinion that the question involved was of very great importance and ought to be determined by a Full Bench, and accordingly they submitted the following reference :—

The evidence, by which it is sought to charge Nobin Chundra Dutt with having done an act whereby he was liable to a forfeiture of the recognizance to keep the peace entered into by him, was not taken in his presence, and he had, therefore, no opportunity of cross-examining any of the persons whose testimony constituted the proof on which the Magistrate relies. In the case of *Kalikant Roy Chowdry*, 3 B. L. R., Ap., 155, the Court (E. JACKSON and D. MITTER, JJ.) held under section 293 of the former Criminal Procedure Code, the words of which are substantially the same as those of section 502 of the Code of 1872, that before a Magistrate can declare that recognizances to keep the peace have been forfeited, there must be a regular judicial trial and legal inquiry before the punishment can be inflicted.

The circumstances of that case appear to be the same as those of the present.

Looking to the words of the law, we think it doubtful whether this view is strictly correct, though the course prescribed is one, the principle of which we approve of. The section says: Whenever it is proved before the Magistrate that any recognizance has been forfeited, he shall record the grounds of such proof, and call upon the person bound by such recognizance to pay the penalty thereof, or show cause why it should not be paid; and the following clause provides for the Magistrate proceeding by warrant to levy the amount, if sufficient cause be not shown, and the penalty be not paid; so that if the person called upon should not appear at all to show cause, the Magistrate may act on *proof* recorded before he ever had any chance of hearing of any proceedings against him being on foot.

The procedure prescribed in this section is an exception to the general rule that a man charged with an offence can only be convicted on evidence taken in his presence. It may be that the person charged with an act involving forfeiture of recognizance is entitled to have any witness on whom the Magistrate relies recalled for cross-examination, but it would appear that, under the words of the law, the Magistrate is not otherwise legally bound to examine such witnesses in the presence of the person charged as in ordinary trials.

We think this point of such importance that it should be determined by a Full Bench, and we, therefore, refer the question whether a Magistrate is bound in law to record the proof on which he proposes to forfeit a recognizance to keep the peace in the presence of the person bound by such recognizance.

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We agree with the Sessions Judge on the second point that Nobin Chunder was entitled to have his witnesses examined when he appeared to show cause.

Judgment.

We defer making any final order until the reference to a Full Bench shall be disposed of.

The judgment of the Full Bench (1) was as follows:—

“We find that in the case referred to us Nobin Chunder Dutt was bound to keep the peace for the term of one year in his personal recognizance for the sum of Rs. 500. Within this term certain other persons were charged with a breach of the peace before the Deputy Magistrate, who thereupon convicted Kishna Tappadar and others of an assault; and, though Nobin was not personally concerned in the offence, and was not made a defendant at the trial, the Magistrate decided upon the evidence that he (Nobin) had, by the agency of the convicted persons, caused that breach of the peace to be committed, and he thereupon called upon him to show cause why his recognizance should not be forfeited; and, on his appearance in Court, upon no further evidence than that which was recorded on the prosecution of Krishna Tappadar and others, he declared the recognizance forfeited.

“The course prescribed by section 502 of the Criminal Procedure Code (and by section 293 of the former Code) takes the place of the cumbrous proceeding by *scire facias*, which is in most cases necessary in England, before escheating recognizances to keep the peace.

“In this proceeding the defendant, who has entered into the recognizance, has an opportunity of pleading to the *scire facias*, and of thus raising the question whether he had been guilty of the assault or no; and upon the issue raised by that plea a trial takes place, at which evidence is gone into, precisely as in a civil suit.

(1) GARTH, C. J., and JACKSON, PONTIFEX, BIRCH and AINSLIE, JJ.

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"We think that, according to the fair construction of section 502, a Magistrate is not justified in forfeiting a recognizance under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause has been issued.

"That opportunity may arise, either upon the prosecution of the accused person before the Magistrate for a breach of the peace or any other offence, in which case, the accused, being the defendant, would, of course, have the right to cross-examine the witnesses, for the prosecution; or it may arise upon a substantive application made to the Magistrate to forfeit the recognizance, in which case the witnesses upon whose evidence the rule is granted ought to be present and subject to be cross-examined by the accused, upon the occasion when cause is shown against the rule.

"If no cause is shown, or if the accused declines to cross-examine the witnesses, the Magistrate may, of course, proceed to dispose of the case upon the evidence as it stands. It is obviously sufficient for the purposes of justice that the accused has had the opportunity of cross-examination."

The Division Bench delivered the following final order in the case:—

We are of opinion that the order of the Magistrate, directing the forfeiture of the recognizance entered into by Nobin Dutt, must be set aside, and that the Magistrate should allow Nobin Dutt to have the witnesses, on whose evidence he relies to establish the forfeiture, recalled for cross-examination, and should also allow him to call those witnesses whom he wishes to examine for the purpose of supporting the cause shown.

[FULL BENCH.]

GOPI MOHUN MOULIK . . (PLAINTIFF) APPELLANT ;

AND

PARAMONI CHOWDHURANI . (DEFENDANT), RESPONDENT.

1879
April 17th.
—
No. 59 of
1877.

*Nuisance—Criminal Procedure Code, Act X. of 1872, section 518—Power of
Magistrate—Rival Hauts.*

A Magistrate has no power, under section 518 of Act X. of 1872, to make an order prohibiting one of two rival proprietors of two different hauts from holding in the future his haut on Tuesdays and Fridays, such an order being in the nature of a perpetual injunction, and entirely beyond his jurisdiction.

Where the plaintiff, after stating in his plaint that for many years he had held a haut on his own lands on Tuesdays and Fridays, alleged that the defendant had set up of a rival haut on the same days, and endeavoured to prevent people attending his haut, thereby creating a disturbance which led to the Magistrate passing an order under section 518 of Act X. of 1872, prohibiting him (the plaintiff) for the future holding his haut on these days, *held* that, assuming the facts to be true, the plaintiff was entitled to a decree declaring that, as against the defendant, he had a right to hold his haut on Tuesdays and Fridays.

REGULAR APPEAL from a decision of the Subordinate Judge of Mymensingh.

The appeal came on for hearing before Mr. Justice MITTER and Mr. Justice MACLEAN, who referred the case to a Full Bench in the following terms:—

The plaintiff alleges that he is the owner of a shikmi taluq, consisting of Mouzahs Nalitabari, &c.; that within Mouzah Nalitabari there was a haut from the year 1190, which used to be held on Tuesdays and Fridays; that a new haut called Tarajung was established by the defendant in a neighbouring place, within the zemindari of the latter, who attempted, by illegal means, to prevent people from making their market in his haut; that disputes having arisen in consequence of defendant's illegal acts, the Deputy Magistrate of Jamalpur, by an illegal and unjust

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order, dated the 31st May 1875, has prohibited the plaintiff, under section 518 of Act X. of 1872, to hold the Nalitabari haut on the days it used to be assembled; that in consequence of this order the plaintiff's haut has been closed, and he thereby sustained a heavy loss; that of the two hauts, the plaintiff's haut is far more ancient, and had been held from the year 1190 on Tuesdays and Fridays, till closed by the aforesaid Magistrate's order; that, "in accordance with justice and equity," he is entitled to assemble the haut on his own land in Nalitabari on the aforesaid days; that this suit has been brought to set aside the unjust order of the Magistrate, and to declare the plaintiff's right to hold his haut on Tuesdays and Fridays. The defendant, in her written statement, states, (1) that a civil suit to set aside a Magistrate's order passed with jurisdiction will not lie; (2) that the plaint discloses no cause of action against her, and that upon the plaint the plaintiff is not entitled to a decree; (3) that the plaintiff's haut not having been assembled within the last twelve years, the suit is barred by limitation; and (4) that there was no haut at Nalitabari, but that the plaintiff, having established a new haut, attempted to make it flourish by various acts of oppression on *hautawaries*, whereupon the Magistrate, after a judicial finding that the plaintiff's servants were to blame for these acts, has passed the order complained of.

The lower Court has dismissed the suit, and the plaintiff has preferred this appeal. It has been urged before us, in appeal, on behalf of the defendant, respondent, that the plaintiff cannot succeed, even if all the facts stated in his plaint be established; that no cause of action against the defendant has been disclosed in the plaint; and that the Civil Court has no power to set aside an order passed by a Magistrate with jurisdiction under section 518 of Act X. of 1872.

Another case is also before us in which the same points are involved; and as the questions raised are not free from difficulties and doubts, and civil cases of this nature are likely to be more frequent in consequence of very large powers being vested in Magistrates under section 518 of Act X. of 1872, we think it desirable that there should be an authoritative decision by a Full Bench upon these points. The questions referred are—

First.—Whether the plaintiff is entitled to a decree, and (if entitled) to what decree upon the facts stated in the plaint?

Second.—Is there any cause of action disclosed against the defendant?

Third.—Upon the facts stated in the plaint, could the plaintiff claim any damages or seek any other consequential relief against the defendant?

Fourth.—Whether the Civil Courts can set aside an order passed with jurisdiction by a Magistrate, under the section 518 of Act X. of 1872?

Fifth.—Whether the Magistrate was competent to pass the order complained of in this case under the provisions of section 518 of Act X. of 1872?

We are aware that there are two Full Bench decisions, more or less, bearing upon the last question. But one of these was passed with reference to the construction of section 62 of the old Procedure Code; and in our opinion the explanation of section 518 of Act X. of 1872 has made a material alteration in the provisions of section 62 of the old Procedure Code. In the other case, the question raised was whether the Court, under the provisions of section 15 of 24 and 25 Victoria, Chapter 104, has power to interfere with an order passed by a Magistrate under section 518 of Act X. of 1872.

Woodroffe (Baboo *Kali Mohan Dass*, Baboo *Bhuban Mohun Doss*, and Baboo *Jogesh Chunder Roy* with him), for the Appellant.

Evans (Baboo *Sreenath Doss* and Baboo *Kishen Doyal Roy* with him), for the Respondent.

Woodroffe, for the Appellant.

The cases now dealt with under section 518 of Act X. of 1872 were formerly dealt with under section 62 of Act XXV. of 1861. These two sections are the same up to the word "affray" in the section in the later Act.

Section 521 (referred to in 518) of the Act of 1872 substantially treats the same class of cases as section 308 of the old Code. We find section 518 in the new Code and section 308 of the old, both under the head entitled "Of Local Nuisances."

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Argument.

Now, it seems plain upon the wording of section 518 of the present Code, and having regard to the chapter in which it is inserted, and to the explanations appended thereto, that a Magistrate is not empowered to pass an order under section 518, save in cases where a speedy remedy is desirable, and where the delay occasioned by a resort to section 521 and following sections would occasion greater evil, or would defeat the intention of the chapter.

It is not stated in the Magistrate's order, which we are now considering, that there was any circumstance requiring urgency.

In the case of *Banee Madhub Ghose vs. Wooma Nath Roy Chowdhry*, 21 W. R., Cr., 26, it was held that the operation of section 518 is confined to cases where, in the opinion of the Magistrate, the delay which would be caused by adopting a different procedure from that specified in the explanation to the section would occasion a greater evil than that suffered by the person on whom the order was made, or would defeat the intention of the chapter, and there an order of a Magistrate, under section 518, was set aside as being *ultra vires*, being based upon a police report, which was vague and insufficient to show proper ground for an order under that section.

[GARTH, C. J.—This appears to have been a case under section 15 of the Charter Act, and the order was set aside on the ground that it was made without jurisdiction.]

Again the order of a Magistrate passed under section 518 was set aside by KEMP and GLOVER, JJ., in the case of *In re Bindabun Dutt*, as being illegal. Their Lordships say: "This is clearly a case for an order under section 521, and we, therefore, quash the order." It does not appear whether that order came up under section 15 of the Charter Act.

[GARTH, C. J.—The order must have come up under the Charter Act, for there could be no reference or appeal from an order under section 518, an order under that section not being a judicial proceeding.]

I raised that objection in the case of *In re Bykuntram Shaha Roy*, 10 B. L. R. 434, that the order there under section 518 not being a judicial proceeding, there could neither be a reference nor an appeal to the High Court.

In the case of *Sreenath Dutt vs. Unnoda Churn Dutt*, 23 W. R., Cr., 24, it was held that the circumstances of the case did not warrant an order under section 518.

An application was made before MARKBY and MITTER, JJ., *In re Krishna Mohun Bysack*, 1 C. L. R. 58, to set aside the order of a Magistrate passed under section 518. That was a case where it did not appear that any delay which would be occasioned by a resort to less summary proceedings would occasion any serious evil whatever. Their Lordships quashed the order as illegal, being of opinion that the order was not one falling within the provisions of section 518, and therefore subject to section 520, but came within the definition of a judicial proceeding as given in section 4, and was, therefore, subject to the same revision as any other judicial proceeding of a Magistrate. See also *Chunder Coomar Roy*, petitioner, 27 W. R., Cr., 78, quoted in last case.

[GARTH, C.J.—We are all agreed that the circumstances of emergency must be such as to justify the Magistrate in making an order under section 518, and that if they are not, the order may be set aside as made without jurisdiction. The questions you have to consider are, first, whether the circumstances are such as to give the Magistrate jurisdiction; secondly, if they were, had he power to make an order tying up the rights of all parties for all time?]

I submit, on the authority of the cases cited, that, having regard to the terms of section 518 and the terms of the order passed, the Magistrate was not competent to pass the order complained of under section 518. But I go further and say that, even if circumstances had existed which would have justified the Magistrate in passing the order under section 518, and even if these circumstances had been set forth in the order, the Legislature did not contemplate the passing of an order which, in fact, amounted to a perpetual injunction preventing a man exercising his civil rights. I am not aware of any authority in support of the contrary proposition.

I now come to the question as to the Magistrate's power to pass this order. The use of the word "prevent" in section 518 points to the time when the action of the Magistrate is to be invoked. So far as the case of *Bykuntram Shaha Roy*, 10 B. L. R. 434, goes, there is nothing against my argument. The question

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in that case 'really amounted to this: Can a Magistrate, in a case which comes within section 62 of the old Code, for public reasons, prohibit a man from holding a *haut* at a particular place and time? and the answer was, that circumstances may exist which would make a temporary interference lawful. The Judges there do not support the proposition that a perpetual order of this kind could have been made.

The case of *Shib Chunder Bhattacharjee vs. Saadut Ali Khan*, 4 W. R., Cr., 12, shows that a Magistrate has no power to interfere with private rights, and that a landlord may set up a *haut* if he pleases, although in *Reg. vs. Kali Prosad*, 5 B. L. R., Appendix, 82, where there were two rival *hauts* on adjacent pieces of land, the parties were prohibited from holding them on the same day.

It is laid down in *Huri Mohan Malo's* case, 1 B. L. R., A. Cr., 20, that, under sections 62 and 308, the Magistrate must make a clear statement in the order itself of the circumstances under which he makes the order.

In the Full Bench case, *Reg. vs. Abbas Ali Chowdhry*, 6 B. L. R. 74, which succeeded these cases, the question was, whether an order made under section 62 was a judicial proceeding or not, and as such liable to revision. PHEAR, J., who dissented from the judgment of the Full Bench, considered that the power conferred by section 62 was of a judicial character, within the meaning of the word "judicial" in section 404, and that an order of a Magistrate in exercise of that power was, in the nature of an injunction, and therefore subject to revision by the High Court, under section 404 of the Criminal Procedure Code.

There is a class of cases which show that Magistrates have no power to make orders which are in their nature in deprivation of the right of private property. In *Reg. vs. Ram Chunder Mookerjee*, 5 B. L. R., A. Cr., 131, where a Magistrate, being of opinion that certain bamboos were too thick and close to another man's property, under section 62 of Act XXV. of 1861 ordered them to be cut down as being a nuisance and injurious to health, it was held that the Magistrate had no power to make the order. See *Reg. vs. Sheikh Golam Darbesh*, 1 B. L. R., Short Notes, 27. The case of *Arzanoolah vs. Nazir Mullick*, 21 W. R., Cr., 22, where a Magistrate made an order prohibiting the re-opening of

a haut, is very similar to the case in point. In *Tarucknath Mookerjee vs. Collector of Hooghly*, 13 W. R., Civ. R., 13, when an action was brought against the Collector in consequence of an order as to the cutting of a bund, it was laid down that the Government had no right summarily to destroy private property merely because it considered that doing so would be for the public convenience.

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So in the case of *Purneah Singh vs. Jogessur Sahaye*, 8 W. R. 112, where a Magistrate, professing to act under section 62 of Act XXV. of 1861, made an order that a bund should be cut, a suit was brought by the plaintiff, against whom the order was made, for a declaration of his right to have the bund closed, and for damages against the persons who had set the law in motion; the High Court ordered that the bund should be closed, though the claim as to damages was dismissed.

That an order can be set aside in this way is stated also in the notes upon section 518 of Act X. of 1872 by Mr. PRINSEP, who quotes the case of *Sidgopal*, 5 Agra 108.

In *Thakoor Sing vs. Sheo Pershad Ojhar*, 5 All. R. 8, the order directed the parties to abstain from holding a market on particular days, with leave to any person aggrieved thereby to bring a civil suit.

[Mr. *Woodroffe* was here stopped by the Court.]

Evans, for the Respondents:

I shall first contend that the Magistrate had a right to make this order, and that, under the circumstances, the question is not now triable here, but that if it is, it cannot be triable between the plaintiff and any other individual, but between the plaintiff and the Crown.

Since the decision of *Jugnarain Dutt vs. Hurri Churn Deb*, S. D. A., 1853, p. 275, it has been held law in this country that all zemindars, as between themselves, have a right to hold hauts.

[GARTH, C.J.—In your written statement you state that the plaintiff has no right to hold a haut by reason of the order of the Magistrate. You can't say as against you he has a right to have the order set aside?]

[CRIMINAL.]

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I contend that the plaintiff has no right in any civil proceeding whatever to have this order set aside. Under any circumstance, this is not the tribunal to set aside the Magistrate's order. If there was jurisdiction to pass the order, it cannot be set aside.

[WHITE, J.—But suppose the Magistrate had no jurisdiction to make the order, isn't it a nullity?]

It is.

[WHITE, J.—Then, if it is a nullity, may not the plaintiff sue to establish his rights?]

It has been decided that a man cannot acquire a prescriptive right to the custom of market. I put this forward to show that there is no right of property interfered with at all, for Mr. Woodroffe has been arguing upon the alleged deprivation of right of private property. The order complained of is an order altering the day of the haut. Regulation XXVII. of 1793, which provides for the tolls, &c., derivable from hauts, declares the position of hauts in this country. There is no common-law right to hold a market in India any more than there is in England. The right to take tolls was taken away from all subjects by the Government; but at the same time this regulation provides that zemindars shall still have the right to charge rent for shops, &c., in the hauts upon their lands.

It is for the preservation of peace and quiet that no right of market is allowed in England, except under grants from the Crown.

Now, all that the Magistrate has done here is to say that the plaintiff must not assemble people on certain days in the week; he does not prohibit the holding of his haut; no right of property is interfered with.

It must follow, as in England, that the right to assemble people together ought to be subject to the ruling power. We find from the cases that, as a matter of fact, hauts in this country have been constantly regulated by the Magistrate. It is not necessary for me to go so far as to say that these hauts are illegal. I only say there is no common-law right to hold a haut, and that the ruling power has, and ought to have, a right to interfere for the preservation of the peace, by prohibiting, if necessary, the assembling of the people. Assembling a haut is not a right or incident of property, and never was.

[GARTH, C.J.—If holding a haut is not illegal, has not the plaintiff a right to hold his haut?

Yes; if there is no order of the Magistrate prohibiting it. The power giving under section 518 is general, and under it the Magistrate may interfere to stop all disturbances, whether in respect of a haut or not.

I now come to consider the order itself. The first question is, whether the Magistrate had jurisdiction.

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That he had jurisdiction to prevent the holding of the haut, for a limited period at all events, is clear from the case of *Bykuntram Shaha Roy*, 10 B. L. R. 434, S. C., 18 W. R. 47.

Is the Magistrate, who fears an affray will take place on Tuesday, to limit the order to that day, when he apprehends perhaps that an affray is equally likely to take place on the Friday following?

It would appear that so long as the Magistrate exercises his discretion in preventing future disturbance, the power to act, as he has done, is a salutary if not a legal power. A Civil Court cannot prohibit a rival haut, however close—*Jugnaraia Dutt vs. Hurri Churn Deb*, S. D. A., 1875, p. 275, and as it was necessary for some one to take the matter in hand, the only person who could do so was the Magistrate.

Section 521 refers only to a small class of cases comprised by section 518, and makes no reference to a riot or affray, so the Magistrate could not have acted in this particular case under that section.

Where a Magistrate having jurisdiction has passed an order, after satisfying himself of the necessity for the order, the Civil Courts have no power to question his discretion—*Kedar Nath vs. Rugho Nath*, 6 N.-W. P. 104. In such a case the proper course for a party aggrieved to adopt would be to ask the Magistrate to reconsider his order. If he refused to consider the order the only remedy would be by suit against the Magistrate.

[GARTH, C.J.—We have already held that proceedings cannot be taken against a Magistrate who has acted *bona fide* under a particular provision of the law.]

That is in case of a judicial proceeding, but the order, under consideration is not a judicial proceeding.—*Reg. vs. Abbas Ali Chowdhry*, 6 B. L. R., F. B., 74.

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[GARTH, C.J.—The question there was whether the order was so far judicial as to be subject to revision, and therefore coming within the Statute, Act XVIII. of 1850, which protects Magistrates in the performance of their duty.]

That question was fully discussed in the case of *Chunder Narain Singh vs. Brijob Bullub Gooyee*, 14 B. L. R. 254, where it was held that the removal of an obstruction by a Magistrate in the exercise of powers conferred upon him by Act VI. (B.C.) of 1868, was not a judicial proceeding; and that therefore the Magistrate making the order was not protected by Act XVIII. of 1850 from suit at the instance of the person against whom the order was directed.

In *Ujalamayi Dasi vs. Chandra Kumar Neogi*, 4 B. L. R., F.B., 24, it was laid down that a suit would not lie in a Civil Court to set aside an order as to a nuisance, duly made under section 308 of Act XXV. of 1861, or to restrain the Magistrate from carrying his order into effect.

So it was held in the case of *In re Chunder Nath Sen*, 1 L. R., 2 Cal. 293, that the High Court could not interfere, under section 15 of the Charter, with orders duly passed by Magistrates under section 518.

There is some difficulty as to the jurisdiction, but on the authority of the case of *Bykantram Shaha Roy* already cited, the Magistrate would have power to stop the market by an order under section 518.

[GARTH, C.J.—But would the Magistrate be justified in making an order to extend indefinitely into the future?]

The order ought not to be bad because issued without restriction as to time; a temporary order has been held to be good. In *Reg. vs. Kaliprasad*, 5 B. L. R., Ap., 82, Note, a Magistrate was held to have power under section 62 of the old Code to make an order of this kind.

[JACKSON, J.—In that case we raised the question whether the Magistrate had power to restrain a person from exercising his undoubted rights.]

[GARTH, C.J.—Is there any authority to show that this order is good so far, though not good to the extent of directing that the hut shall never again be held?]

There is the case reported in *Kedar Nath vs. Rugho Nath*, 6 N.-W. P. 104.

[GARTH, C.J.—The present order appears to be indivisible; it is simply an order restraining the plaintiff holding his haut again.]

I admit that there is no limit of time expressed in the order; but in such a case as this, it would be difficult to fix a time for the duration of the order. No doubt, if the order is to be looked at strictly according to the rules of English law, the order may be said to be bad.

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[AINSLIE, J.—For the Magistrate to have passed an order in the nature of a perpetual prohibition under section 518, he must have been able to certify the existence of an emergency for ever.]

[JACKSON, J.—Suppose the order had been directing the plaintiff not to hold his haut any Tuesdays or Fridays, except next Tuesday and Friday, could that order have been good?]

In that case there would have been no emergency, and the order would have been bad in the face of it. Here the Magistrate makes the order general as to Tuesdays and Fridays, and this may be taken with the explanation to the section to be intended to remain in force only until further order. The proper course would be to ask the Magistrate to specify for what time the order should enure.

The next question to be considered is, whether the plaint discloses a cause of action. I am not prepared to admit that the plaintiff is entitled to a declaration of his right to hold his haut. Had the plaint been framed on the allegation that I had caused him loss by preventing people from attending his haut, there would have been a good cause of action disclosed, but it is not so framed; the damage or loss is stated to have arisen from the Magistrate's order, and that damage is too remote.

[WHITE, J.—Looking at the plaint, it seems clear that the plaintiff is entitled to a declaratory decree (and to an injunction if he had asked for it); the only question seems to be as to his right to have the Magistrate's order set aside.]

Not having made the Magistrate a party to the suit, he cannot succeed upon that point. I contend that the order cannot be set aside under section 15 of the Charter or under the Criminal Procedure Code.

Mr. Woodroffe was not called upon to reply.

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The following judgment of the Full Bench (1) was delivered—

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[GARTH, C.J.]

In answering the questions which have been referred to us by the Division Bench, it will be convenient, in the first place, to dispose of the last and most important of them, *viz.*, whether the Magistrate was competent to pass the order complained of under the provisions of section 518 of Act X. of 1872?

The order was in these terms:

"To Gopi Mohun Moulik, inhabitant of Paikpara, Pergunnah Shurpur.

"Case—Unlawful assembly.

"It has appeared at the trial of the said suit that a haut having been established since 20 or 25 years at Tarajung, the estate of the said Chowdhrahi, is duly held every week on Tuesday and Friday. At present, you having set up a new haut at Nalitabari, which is quite close to the said haut, have fixed Tuesdays and Fridays, in other words the days on which the Tarajung haut is held, for holding your newly-established Nalitabari haut. Since by reason of the days fixed for holding this newly established rival haut being exactly the days on which the Tarajung haut is held, an occurrence leading to a breach of the peace took place at the said newly-established Nalitabari on the 20th of April 1875, corresponding with the 8th of Bysack of the year 1282 B. S. Consequently, unless the days for holding the said Nalitabari haut be altered, there is every likelihood of men's health and peace being affected, and of affrays and breach of the peace taking place in future. Hence you are hereby prohibited from holding the Nalitabari haut on Tuesdays and Fridays in accordance with the provisions of section 518 of the Criminal Procedure Code, and you are ordered to alter the days of holding the said haut. The 31st May 1875."

We may assume, for our present purpose, that the circumstances under which the Magistrate was called upon to interfere were such to enable him to make an order of some kind under that section.

The question is, whether he had the power, under any circum-

(1) GARTH, C.J., JACKSON, PONTIFEX, AINSLIE, BIRCH, MORRIS, WHITE, MITTER, McDONELL, PRINSEP, WILSON, and BROUGHTON, JJ.

stances, to make an order prohibiting the plaintiff for ever from holding a hant on every Tuesday and Friday on his own land.

We believe that this is the first occasion on which this point has been seriously considered by a Full Bench of the Court; and as we are aware that Magistrates in this country have been in the habit of making orders of this nature, restraining persons for an indefinite period from the exercise of civil rights over their property, and as this practice has apparently derived some sanction from former Full Bench decisions of this Court, it has been thought advisable in this instance to take the opinion of the whole of the Judges, in order to determine a question which, undoubtedly, is of very great importance to the public.

The first of these decisions is the *Reg. vs. Abbas Ali Cowdhry*, reported in the 6 B. L. R. 74. The order of the Magistrate in that case was made under section 62 of Act XXV. of 1861, and the only question raised was, not whether the order itself was good or bad, but whether the High Court had any power to deal with it as a Court of Revision; and it was held that as the order was not a judicial act, the High Court had no such power. The next of these decisions was in the matter of *Bykuntram Shaha Roy*, 10 B. L. R. 434. The order there also, which was similar in its terms to that which we now are considering, was made under section 62 of the Act of 1861; but the question which was argued and decided there was, whether a Magistrate under that section could prevent a landowner from doing a *lawful* act on his own land, it being contended that he had only a right to prevent acts *which were in themselves unlawful*.

The point which is now before us, namely, the time during which such an order could legally be made, was not raised, or intended to be raised, in that case, for the Chief Justice, in delivering the judgment of the Court, expressly says: "It is not necessary for us to determine the question whether the Magistrate has in this particular case exercised his discretion in a proper manner, or *whether his order, as it stands, requires any amendment as to the duration of the injunction or otherwise*, for these questions have not been referred to us by the Division Bench." And he goes on to say that "there may be circumstances" which

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would justify a Magistrate in issuing an order under section 62, at least for a limited "time," which shows that the point which we have now to decide was present to the mind of the Court, although they were not called upon to decide it.

The last Full Bench Decision, in which a similar order came under discussion, was in the matter of *Chunder Nath Sen*, I. L. R., 2 Cal. 293. The order there was made under section 518 of the present Code, with which we are now dealing; and the question referred was, whether this Court had jurisdiction to set aside the order under section 15 of the Charter Act.

It was there contended that, under the circumstances, the Magistrate had no power to make any order at all; and, if that were so, that this Court could and should, under section 15, have set aside the order as being made without jurisdiction.

But the Court decided that the circumstances were such as to give the Magistrate jurisdiction to act, and consequently that they could not interfere.

The point was never raised in that case, though probably it might have been that the terms of the order itself, as regards its duration, were not warranted by law; and, therefore, we find ourselves now dealing with a point which, although mooted on more than one occasion in the Court, and also by the Allahabad High Court in the case of *Kadar Nath vs. Rugho Nath*, 5 N.-W. P. H. C. 104, is for the first time directly submitted for our determination.

The provisions of section 62 in the Code of 1861 are substantially the same as those of section 518 of the present Code; but there are certain explanations appended to the latter section which aid us materially in the construction of it.

The first of them relates to the cases to which the section was intended to apply, and shows that it is applicable only where a speedy remedy is called for, and were, for either of the reasons specified, a more formal procedure would be inappropriate. We think it would be inconsistent with this expression of the intentions of the Legislature that a Magistrate should pass under this section an order meant to have more than a temporary operation; and although such order may no doubt, for what seems to the Magistrate sufficient cause, restrain a man in the otherwise lawful

exercise of his rights, such restraint ought clearly not to be indefinite in its terms, or to have effect beyond the urgency which it was intended to provide for.

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Now, in this instance, it is clear that the order of the Magistrate would have such effect.

.. The plaintiff says in his plaint that for many years past he has been in the habit of holding a haut on every Tuesday and Friday in his own mouzah; and that as the owner of the adjoining mouzah insisted on holding a rival haut on the same days, disputes arose and violence was threatened, which the Magistrate was called upon to prevent; whereupon he made the order in question, under section, 518, prohibiting the plaintiff for the future from holding his haut on Tuesdays and Fridays.

We consider that the Magistrate had no jurisdiction to make so wide an order, and that the grant of what is in effect a perpetual injunction is entirely beyond his powers. He might have prohibited the holding of the haut on any particular occasion or occasions, but he had no right to deprive the plaintiff for ever of a right to which he was by law entitled.

The last question, therefore, is answered in the negative; and we now proceed to deal with the questions 1, 2, and 3, which may conveniently be answered together.

The plaint, after alleging that the plaintiff had held his haut on his own land for many years on Tuesdays and Fridays, alleges that the defendant set up a rival haut, and endeavoured to prevent persons from attending the plaintiff's haut; that this led to disturbances, which ended in the order being made by the Magistrate, prohibiting the plaintiff from holding his haut on the above days, and that the plaintiff has suffered loss and damages in consequence.

We think that, assuming these facts to be true, the plaintiff is entitled to a decree, declaring that, as against the defendant, he has a right to hold his haut on Tuesdays and Fridays.

We are agreed that, for the purposes of this case, it is unnecessary to answer the 4th question.

[FULL BENCH.]

IN THE MATTER OF PITAMBUR SINGH , , APPELLANT.

1879
Dec. 8th.
—
No. 549 of
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*Adultery—Evidence Act (I. of 1872), section 50—Penal Code (Act XLV. of 1860)
section 497—Marriage, Evidence of.*

Where a marriage is an ingredient in an offence, as in adultery, bigamy, and enticing away a married woman, it must be strictly proved.

THIS case was referred to a Full Bench by Mr. Justice WILSON and Mr. Justice L. R. TOTTENHAM, two of the Judges of this Court, with the following expression of opinion:—

In this case the prisoner has been convicted of adultery under section 497 of the Indian Penal Code.

The only evidence of the marriage of the woman is the statement of the prosecutor, "She is my wife by marriage," and the statement of the woman, "I am married to Somra" (the prosecutor).

We desire to submit for the opinion of a Full Bench the question whether a conviction for adultery can be sustained upon such evidence of the marriage.

Two decisions of this Court appear to be in conflict. In *Reg. vs. Smith*, 4 W. R., Cr. R., 31, a conviction of adultery was set aside on the ground (amongst others) that there was no sufficient proof of the marriage, and it was laid down that "in proceedings founded on a charge of adultery strict proof of the marriage is required."

To the same effect is letter No. 1141, of 15th December 1865, issued by this Court (see 4 W. R., Cr. Letters, 10). In *Reg. vs. Wasira*, 8 Ben. L. R., App., 63, evidence of the same nature as that in the present case seems to have been held sufficient.

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It appears to us that upon principle such evidence must be held insufficient. The marriage of the woman is as essential an element of the crime charged as the illicit intercourse: and it ought, we think, to be proved, like any other essential fact in the case, by the direct evidence of witnesses speaking to the fact said to constitute a marriage (Evidence Act, section 60), so that the Court may determine whether what they state to have taken place did take place in fact, and if so, whether it constitutes a marriage in point of law.

The sections of the Evidence Act which, in certain cases and for certain purposes, allow less strict proof of marriage appear to be section 32, which has no application here, and section 50, which expressly excludes from its operation criminal charges of bigamy, adultery, and enticing of married women. This express exclusion seems to us strong to show, that, in such cases, the Legislature intended the marriage to be proved by direct evidence.

The Indian Divorce Act (Act IV. of 1869), which governs civil proceedings based upon adultery, confirms this view. It gives the form of a petition for divorce, in which the marriage is alleged as a fact, with time and place. If this is to be alleged, it is presumably because it ought to be proved, and it can hardly be supposed that greater strictness of proof is to be required in a civil proceeding than in a criminal proceeding founded upon the same facts.

It appears to us that the framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law, and in England there has never been any doubt that, on an indictment for bigamy, the first marriage, or in proceedings founded upon adultery, the marriage must be proved with the same strictness as any other material fact.

We cannot see that any inconvenience is likely to follow from adopting the stricter rule. Amongst the large majority of the people of this country, marriage is accompanied with so much of ceremonial and publicity, that there can rarely be any difficulty in proving it. If there be any class of the community with whom it is otherwise, whose marriage notions and practices are so lax as to render many marriages of doubtful validity, this

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seems to us additional reason for requiring the actual facts to be brought properly before the Court, so that it may determine the validity of the marriage in each case that comes before it.

The decision of the Full Bench (1) was as follows:—

We think it clear that in this case the evidence of the marriage is not sufficient to justify a conviction for adultery.

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (section 50) seem to point out very plainly, that where the marriage is an ingredient in the offence, as in bigamy, adultery, and the enticing of a married woman, the fact of the marriage must be strictly proved in the regular way.

(1) GARTH, QY., and PONTIFEX, MORRIS, and McDONELL, YY.

[FULL BENCH.]

EMPRESS

AND

ANAUTHRAM SINGH AND OTHERS

1880
April 16th.*Confession—Criminal Procedure Code (Act X. of 1872), sections 122 and 346.*

Two accused persons, on being arrested, were forwarded in custody to a Magistrate, who had jurisdiction in the matter with which they were charged, and who afterwards conducted the preliminary inquiry, and committed them to the Court of Session. Before the Magistrate each made a confession, but neither of them attested his confession by his signature or mark.

Held that the confessions, although the Magistrate had noted that they were taken under section 122 of the Code of Criminal Procedure, must be regarded as having been taken in the course of a preliminary inquiry, and that the provisions of section 346, allowing the evidence of the committing Magistrate to be taken, applied.

Per Curiam :—Section 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is to be inquired into or tried.

CRIMINAL APPEALS from convictions and sentences passed by the Sessions Judge of Cuttack. There was also a reference by the Judge for confirmation of the sentences passed.

The appeals and reference were heard by Mr. Justice JACKSON and Mr. Justice TOTTENHAM, who referred the case to a Full Bench, with the following statement and expression of opinion :—

One Anauthram, with a woman named Tophia Bewah, and others, were charged with a most brutal and atrocious murder, and were tried by the Court of Session of Cuttack. Anauthram and Tophia were convicted and sentenced to death, and their appeal is now before us. A third person, named Dariah Singh, was also convicted, and sentenced to transportation for life, and he has appealed. The evidence for the prosecution was scanty, and was not of very good quality, and part of it consisted of two confessions made by the prisoners Tophia and Dariah, and recorded

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by the Joint Magistrate, who afterwards committed all the prisoners for trial. Upon these confessions being tendered in evidence at the trial, it was objected on the part of the accused that they were not admissible, inasmuch as the Magistrate had omitted to annex to them the certificate prescribed by section 346, and also that they had not the signatures or marks of the accused. The form of certificate required by section 122 had been appended by the Magistrate, not to the vernacular record of the prisoner's statement, but to the note of it which he took simultaneously in English. It was also contended that the prosecution was not at liberty under section 346 to take evidence to prove that the prisoners had duly made the statement recorded, because it was said that this examination, being taken under section 122, had not been taken in a preliminary inquiry. It was urged that the Joint Magistrate had not, up to that time, got the case properly before him upon his own file, and that he himself had given the strongest possible proof of the nature of his proceeding by noting the confessions in the case of both prisoners as taken under section 122. The Sessions Judge, however, for the reasons stated in his judgment, came to the conclusion that, notwithstanding the use of the words "section 122" by the Joint Magistrate, they were really examinations recorded under section 346, and therefore he allowed evidence to be given, showing that the prisoners had duly made the statements. The Sessions Judge arrives at this conclusion not without some hesitation, and he refers to decide cases which had been cited before him from 10 Bombay High Court Reports—*Reg. vs. Bai Ratan*—and also to a case in our own Court, 4 Calcutta Law Reports, page 137—*Empress vs. Panioli*. Since then there has been another decision by my brothers WILSON and TOTTENHAM, 5 Calcutta Law Reports, page 238, in the matter of *Behari Hadji*, in which the same point had been considered.

In regard to the case in 4 Calcutta Law Reports, we entirely concur in the ruling of the learned Judges. There the confession was recorded under section 122 before a Magistrate who, at the time when he recorded it, had no jurisdiction over the case. In the present instance the facts were different

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inasmuch as the Magistrate who recorded the confessions had jurisdiction, and did himself conduct the inquiry from first to last, and eventually committed the accused to the Sessions. The questions which appear to us material, and which are of very great importance, are—*1stly*, Is not a confession, recorded by a Magistrate having jurisdiction, to be treated as an examination under section 193, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the police-investigation; and, *2ndly*, Is the examination to be excluded by reason of the absence of a certificate that it contains accurately the whole of the statements made by the accused person, although the certificate required by section 122 is forthcoming, and although the prisoner himself admits that the examination does contain the whole of his statement? We think these questions to be of such difficulty and importance that they ought to be decided by a Full Bench of this Court, and we refer the case accordingly.

We observe that the subject has also been considered in a still more recent case by MORRIS and PRINSEP, JJ., whose judgment commends itself to our approval—*Krishnomoni vs. Empress*, ante p. 289.

The decision of the Full Bench (1) was as follows:—

In the particular case out of which this reference arises, the prisoners Tophia and Dariah were arrested by the Police, and forwarded under custody to the Magistrate having jurisdiction, and made each a confession to him before the police-investigation was concluded (or at least before the report of the police-investigation was submitted). The Magistrate who recorded their confessions was the Magistrate who conducted the preliminary inquiry, and committed them for trial to the Court of Session; and not only had this officer jurisdiction to make the inquiry preliminary to commitment, but he had also the power to determine what Magistrate should conduct the inquiry. The Sessions Judge finds that "when the prisoners were sent up before him on the 17th, he had resolved to take up the preliminary inquiry himself," as indeed his duty required, but that

(1) GARTH, C.J., JACKSON, PONTIFEX, MORRIS, and MITTER, JJ.

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the formal order to that effect was not made till a few days later. The prisoners, as the Judge also points out, ceased to be in the hands of the Police from the time that they were brought before the Magistrate. Their confessions were recorded, and they were ordered to be placed in hajut, and thereafter the preliminary inquiry, as it affected them, was carried on, and the police-investigation was at an end.

Under these circumstances we are of opinion that the confessions of these two prisoners must be regarded as having been made in the course of a preliminary inquiry, and not under section 122, Criminal Procedure Code, and that consequently the provisions of the last paragraph of section 346 apply. Section 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is inquired into or tried. When, therefore, as here, the Magistrate who recorded the confessions was the Magistrate who conducted the inquiry preliminary to committal, and had jurisdiction so to do, such confessions cannot be treated as taken under section 122, nor can the circumstance of the Magistrate having noted, at the head of the confessions, that they were recorded under section 122, affect the matter. The case of *Empress vs. Munnoo Panioli*, 4 Cal. L. R. 137, does not conflict with this view; for, though the Magistrate who recorded the confession in that case subsequently conducted the preliminary inquiry, and committed the prisoner for trial, yet, at the time of recording his confession, he was outside the limits of his jurisdiction, and had no power to take up the preliminary inquiry. It seems to us, therefore, that the first question of reference, *viz.*, whether a confession, recorded by a Magistrate having jurisdiction, is to be treated as an examination under section 193, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the police-investigation, should be answered as we have done.

Holding this view, the second question of reference does not arise, and need not be dealt with.

[FULL BENCH.]

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AND

MUSSAMUT DABI AND ANOTHER.

Penal Code (Act XLV. of 1860), sections 191 and 193—False evidence—Alternative charge—Statements before police—Criminal Procedure Code (Act X. of 1872), sections 118 and 119—Obligation to state the truth—Police investigation.

A charge of giving false evidence under section 193 of the Penal Code, cannot be sustained in respect of a statement made to a police-officer engaged in making an investigation under the provisions of the Code of Criminal Procedure.

Sections 118 and 119 of the latter Code impose no legal obligation on the persons examined thereunder to speak the truth.

Queen vs. Nim Chand Mookerjee, 20 W. R. 41, overruled.

REFERENCE submitted by the Officiating Magistrate of Midnapore for the opinion of the High Court.

The circumstances under which the reference was made were as follow :—

In a case under section 447 of the Indian Penal Code (criminal trespass) tried by Baboo Shamapodo Chowdhry, a Deputy Magistrate in the Sadar Sub-division, Kassim Khan, a witness for the prosecution, stated on oath that what he had said to the police was false, his words being “আমি পুলিশে যে কথা কহিয়াছিলাম তাহা মিথ্যা.” The police-officer who conducted the case before the Deputy Magistrate, applied to him for sanction for the prosecution of the witness under section 193 of the Indian Penal Code, which was granted. The accused witness was thereupon tried by the Joint Magistrate, who discharged him on the ground that the statement made by him on

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oath could not be used against him as a defendant; and that he (the Joint Magistrate) saw no prospect of proving that the accused's statement to the police was actually false.

It appeared to the Magistrate, on the papers being submitted to him, that the Joint Magistrate was wrong in discharging the accused witness. He considered that the accused rendered himself liable, from his own admission, to a charge under section 193 of the Indian Penal Code.

Under the circumstances, therefore, he submitted the matter for the opinion of the High Court, suggesting that the proceedings of the Joint Magistrate should be quashed, and an order for a re-trial directed.

The reference came before PONTIFEX and FIELD, JJ., and was by them referred to a Full Bench in connection with another reference in the case of one Mussamut Dabi, the facts of which it is unnecessary to set out.

In referring the matter to the Full Bench, the learned Judges expressed the following opinions :—

FIELD, J. FIELD, J.—The question submitted to the Full Bench I understand to be this: Can a person be convicted under section 193 of the Penal Code for giving false evidence, the words alleged to be false having been spoken to a police-officer engaged in making an investigation under the provisions of the Code of Criminal Procedure.

The definition of giving false evidence (section 191) is: "Whoever—

- (1) being legally bound, by an oath,
- (2) or by any express provision of law, to state the truth, or,
- (3) being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence."

It will probably be admitted that (3) has no application to the present case, and that it is concerned only with that class of cases of which the declaration to be made by a person obtaining a marriage-license is an example.

Sections 118 and 119 of the Code of Criminal Procedure empower a police-officer making an investigation to examine persons acquainted with the facts of the case under inquiry, and enact that

such persons *shall answer* all questions relating to such case put by such officer except criminating questions. Such answers may be reduced to writing, but they are not to be signed by a person making them, nor are they to form part of the record, or be used as evidence.

These provisions of the Code of Criminal Procedure require the persons examined to answer the questions put to them, but they contain no express provision that such persons *shall state the truth*. This seems to take the case at once out of (2).

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Then as to (1), can a police-officer administer an oath? The Code of Criminal Procedure does not provide for the administration of an oath by a police-officer, but does not expressly prohibit it. In the case of accused persons, an oath is expressly prohibited. It has never been usual for police-officers to administer an oath. Then, were sections 4 and 5 of the Indian Oaths Act (X. of 1873) intended to alter this practice? Consider the words "who may lawfully be examined before any person having by law authority to examine such persons" in section 5. My own view is, that the practice was not meant to be altered.

If, as a matter of fact, no oath was administered by the police-officer, I think there is an end of the question.

The accused in this case gave certain information to the police. Before the Magistrate he swore that this information was false.

The District Magistrate desired to have him punished, under section 193 of the Penal Code, for giving false evidence in his statement made to the police. It is suggested that he can be convicted on an alternative charge of giving false evidence, either in his statement made to the police, or in that made to the Magistrate.

The Joint Magistrate discharged the accused without drawing up a charge, or calling upon him to plead to it, on the ground, as it would seem, that there was no other evidence besides these two contradictory statements. The Magistrate of the District asks us to quash the Joint Magistrate's proceedings, and order a re-trial. I do not concur with the case of the *Queen vs. Nim Chand Mookerjee*, 20 W. R. 41. There is, as I have pointed out, no provision of law which binds a person to state the truth in answer to a question put by a police officer, and, unless a person is legally bound, by an oath or by an express provision of law, to state the truth, the offence of giving false evidence cannot be committed.

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PONTIFEX, J.—I agree.

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The man might possibly be tried for making a false charge, or giving false information to a public officer.

The Deputy Legal Remembrancer, for the Crown.

The decision of the Full Bench (1) was as follows:—

We think it plain that neither the words "shall answer all questions" in section 118 of the Criminal Procedure Code, nor the words "shall be bound to answer all questions" in section 119 of the same Code, constitute "an express provision of law to state the truth" within the meaning of section 191 of the Indian Penal Code.

Sections 118 and 119 are, in our opinion, merely intended to oblige persons to give such information as they can to the police in answer to questions which may be put to them; and they impose no legal obligation on those persons to speak the truth, unless we import the word "truly" in each section after the word "questions," which we clearly have no right to do.

Investigations in a Police Court are not, as a rule, conducted with the same care and accuracy as proceedings in a Court of Justice, and we think that it would be extremely dangerous to the liberty of the subject if information thus loosely taken by a police-officer could be made the subject of a prosecution for giving false evidence.

It may be that, in some cases, the giving of false information may be made the subject of a different charge under other sections of the Penal Code; but this is a matter upon which we are not now called upon to give an opinion.

(1) GARTH, C. J., PONTIFEX, MORRIS, MITTER, and McDONELL, JJ.

[FULL BENCH.]

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Mar. 11th
Nos. 395 and
396 of 1881.

Mohurbhunj—Tributary Mehals of Mohurbhunj.

The territory of Mohurbhunj is not within British India.

REFERENCE submitted by PONTIFEX and MORRIS, JJ., for the opinion of the Full Bench.

The question referred was, whether the territory of Mohurbhunj was within the limits of British India.

Phillips (Officiating Advocate-General), for the Crown.

M. Ghose, for the Maharajah of Mohurbhunj.

The following judgments were delivered by the Full Bench (1):—

PONTIFEX, J.—The question, whether the territory of Mahurbhunj is within the limits of British India, is a question of evidence.

There is nothing to show whether the Mahrattas exercised direct authority over this territory, or whether they treated it merely as tributary. From its situation and character, however, the probability would seem to be that the Mahrattas only exacted tribute from it. Nor does the cession by the Mahrattas to the East India Company throw any further light upon the matter. If the Mahrattas had only the rights of a paramount power, the East India Company could, under the cession, gain no higher rights.

In this state of circumstances, the Regulations of 1804 and 1805 were passed, the Government being probably in doubt as to what rights they actually took from the Mahrattas.

(1) GARTH, C. J., PONTIFEX, MORRIS, MITTER, and PRINSEP, JJ.

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Nothing was done under the Regulation of 1804 (which applies only to the territory ceded by the Mahrattas) to this particular territory. And the Regulation of 1805 seems to me to show that the Executive Government, being in doubt as to its true relation with this territory, determined to deal with it only in a negative way until such doubts were set at rest.

It is observable that, in the Schedule to the Regulation, this territory is described differently from the other estates dealt with.

The Regulations of 1816 and 1821 do not seem to me to carry the case further. They relate only to the exercise of such authority as would properly and naturally be exercised by a paramount power.

The treaty engagement of 1829, if it stood alone, would, in my opinion, be conclusive to show that Mohurbhunj was merely tributary. It is of a different period to the engagements with the other mehals. It proceeds from the Raja of Mohurbhunj without any reciprocal instrument in the nature of a pottah or sunnud from the East India Company; and it speaks of "my territories," of "a contingent force of my own troops," and of "my successors," which is not the language which the Executive Government would be likely to tolerate from a mere subject.

Then come the rules of 1839 issued by the Bengal Government. They assume that there was something peculiar in the status of this territory; and, on the whole, they do not seem to me inconsistent with it being tributary. All that they do is to invest a Bengal officer with necessary authority as the representative of the paramount power to act at the request of the Raja.

No direct civil jurisdiction has ever been exercised in the territory by the Executive Government of India. Lord CANNING'S sunnud distinctly deals with the territory as independent, and not British territory. For example, it ratifies the right of adoption, which would have been mere surplusage if addressed to a British Indian subject. We know that both the Government of India and the Government of Bengal consider the territory to be independent.

Under these circumstances, the question being a mere question of evidence, the maxim *optimus interpres legis consuetudo* applies with very great force.

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PONTIFEX, J.

I am of opinion, therefore, that this territory is not within the limits of British India. And, if that is so, the conviction seems to be right; for the referring Judges state that "the prisoners describe themselves as residents of the Balasore or Singhbhum District," which would bring them within the provisions of section 9 of Act XXI. of 1879.

MORRIS, J.—I concur.

MORRIS, J.

GARTH, C. J.—I agree in the main with my brother PONTIFEX.
GARTH, C. J.

Whether the territory of Mohurbhunj forms part of British India or not is a question of evidence. It depends partly upon documentary evidence, such as Regulations, treaties, and so forth; and partly upon the way in which the territory has been dealt with by the ruling powers, which are principally concerned with it, that is to say, the Governments of India and Bengal on the one hand and the Maharajah, the Native Chief of the territory, on the other.

And when we find that the Indian Government and the Maharajah have, for a long series of years, concurred in considering and treating this territory as no part of British India, and when we also find that Acts of the Indian Legislature, which have been passed for, and have been acted upon throughout, British India, have never been acted upon or considered to be law in this territory, I must say, it seems to me that such evidence, in the absence of any cogent proof to the contrary, ought, in British Indian Courts, to be almost conclusive upon the point. I say "almost conclusive," because I quite think that, under the circumstances of this case, the question is undoubtedly one which the Court is bound to determine, and that no *consensus* of the powers who are interested in the matter ought to be considered as binding upon it.

It is possible, of course, that the Indian Governments and the Maharajah, too, may have been under a mistake. But, before a Court of Justice ought to find it a mistake, I think the evidence that it is so should be clear and convincing—evidence

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of a very different character from the negative and equivocal language of the Regulations to which our attention has been called, or acts of interference by the British authorities, which may have been intended rather as friendly aids to the Maharajah in the management of his own dominions than as evidencing any wish on the part of the Indian Government to take the rule of the territory out of the Maharajah's hands.

Then another point has also been suggested in this case, upon which, as the responsibility of deciding it rests peculiarly with myself, I think it right to explain my views. The question which we have been considering in this reference, had previously come in much the same form before two Division Benches of this Court. Both those Benches, each consisting of two Judges, decided that Mohurbhunj was part of British India. But one of those Benches thought it right to refer certain points for the decision of a Full Bench.

Then, upon the case coming on for argument before this Court, the Advocate-General, on behalf of the Government, desired that we should also consider the question, whether Mohurbhunj formed part of British India; and my brother MITTER, one of the Judges who had previously decided that point, thought that it ought to be so considered; so, after some discussion, we all agreed to hear the point argued and to decide it.

The result has been that three of the Judges of the Full Bench are of opinion that Mohurbhunj is not part of British India, whilst the two other Judges (MITTER, and PRINSEP, JJ.) are of a contrary opinion. My brother MITTER, however, for reasons which he will explain himself, holds, as we do, that the prisoners were rightly convicted.

Thus it turns out that three Judges of the Full Bench have decided one way, whilst four other Judges of the Court have decided the other way; and for this reason it has been suggested to me that I ought to appoint another Full Bench to consider the question again.

If I were to adopt this suggestion, I should appoint a Full Bench consisting of the whole Court; and if I thought that any real good was likely to be gained, or that the interests of

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justice in this particular case required it, I should certainly adopt that course, the more so, because, in the argument before us, the prisoners were not represented.

But, as four out of the five Judges of the Full Bench consider (though for different reasons) that the conviction should be confirmed, and there is no reason to suppose that the prisoners have not had a fair trial, I do not think that the interests of justice require that the case should be heard again. The prisoners had, of course, a perfect right to raise the question of jurisdiction; but it was undoubtedly a technical one, and it has been overruled by the majority of a Full Bench.

That being so, I cannot see that any good would be gained by the whole strength of the Court being occupied (perhaps for days) in discussing an abstract question as to the political status of the territory of Mohurbhunj. The result would be either to affirm our present judgment, or else to place the Government of the country in a position of considerable difficulty. And, lastly, I wish to say that the alleged reason for appointing another Full Bench is, in point of law, no reason at all. It has constantly happened, both here and in England, that the majority of an Appeal Court, which finally decides a point of difficulty, are numerically fewer than the Judges who have previously decided the point the other way.

This was notably so in the Full Bench case of *Gujju Lal vs. Fatteh Lal*, 1 L. R., 6 Cal. 171, which overruled, not only the case of *Nimut Ali vs. Guru Das*, 22 W. R. 365, previously decided by the late Chief Justice and Mr. Justice AINSLIE, but also several other cases which had been decided in the same way by other Judges of this Court.

And the same thing has often happened in England in the Court of Exchequer Chamber. But, in all these cases, the judgment of the Appeal Court is no less decisive of the question; and is considered to be binding upon all other Courts, until it has either been reversed by the House of Lords, or overruled by some provision of the Legislature.

MITTER, J.—Upon the materials before us, I am unable to agree in the conclusion that Mohurbhunj is a foreign territory, and no part of British India.

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By section 2, clause 8, of Act I. of 1868, "British India shall mean the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vic., Cap. 106 (an Act for the better government of India); other than the Settlement of Prince of Wales's Island, Singapore, and Malacca." Section I. of 21 and 22 Vic., Cap. cvi., is to the following effect: "The Government of the territories now in the possession or under the government of the East India Company, and all powers in relation to government vested in, or exercised by, the said Company in trust for Her Majesty, shall cease to be vested in, or exercised by, the said Company, and all territories in the possession or under the government of the said Company, and all rights vested in, or which, if this Act had not been passed, might have been exercised by, the said Company in relation to any territories, shall become vested in Her Majesty, and be "exercised in Her Name; and, for the purpose of this Act, India shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid." Therefore the question for decision is, whether Mohurbhunj was in the possession or under the government of the East India Company.

That Mohurbhunj is part of Zillah Cuttack is clear from the terms of Regulation IV. of 1804, as well as from the concluding section of Regulations XII, XIII, and XIV. of 1805, and the preamble of Regulation XI. of 1816.

The Regulation of 1804 was passed almost immediately after that part of the country came into the possession of the East India Company on the close of the Mahratta war, and extended the general criminal law in force under the government of the East India Company to the province of Cuttack, including Balasore and its dependencies. That territory being formed into the zillah or district of Cuttack, any doubt that might exist whether Mohurbhunj or what is now known as the Tributary Mehals, was dealt with by that Regulation, is removed by a reference to the Regulations (XII., XIII., XIV.) of the following year, which, "for the present," withdrew all this tract of country from the operation of "all Laws and Regulations"

which have been or shall be enacted (Regulation XIV., 1805, section 13). The preamble to Regulation XI. of 1816, moreover, describes Mohurbhunj as one of the Tributary States in Zillah Cuttack.

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In the engagement entered into in the year 1829, by the then Raja of Mohurbhunj (*see* Aitchison's Treaties, &c., Volume I., page 184) he describes himself as "of Killa Mohurbhunj" of Cuttack.

Therefore it is quite clear, both from the Regulations passed by the East India Company and the engagement executed by the Raja of Mohurbhunj, that Mohurbhunj is part of Cuttack.

The whole Province of Cuttack was ceded to the British Government by a treaty, dated the 17th December 1803, between Rhghuji Bhusla and the Hon'ble East India Company (*see* page 97, Aitchison's Treaties, &c., Volume II.).

It has been said that the Mahratta Chief might have possessed only a paramount power over the Rajas of the Tributary Mehals, the sovereign power being vested in them. But, by the 2nd Article of the aforesaid treaty, the province of Cuttack, of which Mohurbhunj is a component part, was ceded "in perpetual sovereignty" to the East India Company.

It has been further said that, shortly after the cession of Cuttack, the British Government was not certain as to the exact status and position of the Tributary Rajas, and that therefore the Regulations of 1805 were not extended to them. The language of these Regulations does not show any uncertainty in the mind of the Ruling Authorities as to the status of these mehals. They were described in sections 36 and 37 of Regulation XII. of 1805 as "jungle or hill zemindaris" or "estates." Their "tributes" are styled as "quit-rents." Referring to the settlement of Mohurbhunj, section 37 says that it will have to be concluded with the "proprietor of that estate for the payment of a fixed annual quit-rent."

The reason for exempting the Tributary Mehals from the operation of the Regulation was not founded upon any uncertainty regarding their status or position, but upon the character of the inhabitants, who are described as "a rude and

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uncivilized race of people." Similar consideration influenced the Government in withdrawing Chota Nagpur in 1833 from the operations of the Regulations. In fact, it is notorious that this was the cause of the formation of what are called Non-Regulation Districts of British India.

Then, in 1816, the Regulation No. XI. was passed vesting an officer under the British Government, *viz.*, the Superintendent of the Tributary Mehals, with the power of trying cases of inheritance or succession to these estates. A special procedure was also laid down in that Regulation.

It is said that these rules were laid down by the British Government as paramount power over the native sovereigns. But the Governor-General in Council could not pass any legislative enactment in respect of any foreign territory.

It may be noticed here that, in the years 1845 and 1850, the Indian Legislative Council passed laws relating to these mehals, and, under section 43 of 3 and 4 Wm. IV., Cap. 85, the Governor-General in Council had authority only to legislate in respect of territories under the Government of the Hon'ble East India Company.

It has been already noticed that, in the year 1829 (that is, several years after the British Government had legislated for Mohurbhunj, and had by Regulation XI. of 1816 assumed to itself the right of determining the succession to the estate of Mohurbhunj, by establishing special Courts and procedure for this purpose), an engagement was executed by the then Raja of Killa Mohurbhunj in favour of the Government of the Hon'ble East India Company. It is headed in the collection of treaties already referred to as "Treaty Engagement." Whether this heading is to be found in the document itself or not, or whether it is a mere description of it given by the editor of the collection of treaties, &c., I have no means of ascertaining. But, in the body of the document itself, it is simply called an engagement. By it, the Raja engages to maintain himself in submission and loyalty to the Government of the East India Company, to pay sicca Rs. 1,001 as peshkush for the said Killa, to depute a contingent force of his own troops with the forces of Government for certain purposes specified in it, and

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to relinquish certain specified claims which he had on "the Government," meaning thereby the Government of the East India Company. The two last clauses are very significant, because they contain distinct admission on the part of the Raja that there was no separate government of his own within the Killa in question. The Raja called the Government of the East India Company "the Government," meaning thereby that there was but one Government in the whole Province of Cuttack, of which Mohurbhunj was component part.

Now, it is said that the condition regarding the deputation of a contingent force of the Raja's troops to act with the forces of Government shows that the engagement was not executed by a subject, but by a sovereign. That no such inference can be legitimately drawn from the condition in question, is clearly shown in the judgment of a Division Bench of this Court in *Hursee Mahapatro vs. Denobundhu Patro*, I. L. R., 7 Cal. 523: (S. C.) 9 C. L. R. 93. The passage is to be found at page 542: I need not make an extract of it here.

In these Mehals the administration of civil justice, excepting in cases provided for by Regulation XI. of 1816 and Acts XXI. of 1854 and XX. of 1850, has been left entirely in the hands of the native Rajas, who have no criminal jurisdiction, except in petty cases. The administration of criminal justice is, with that exception, in the hands of the officers under the British Government. Special rules of procedure were framed in 1839 by the then Superintendent of the Tributary Mehals; though they were not formally sanctioned by the Government, yet the officers entrusted with the administration of criminal justice in these Mehals were directed to follow the spirit of these rules as closely as possible.

The recent orders of Government regarding the powers to be exercised by these officers are thus succinctly recited in the judgment of CUNNINGHAM, J., in the case already referred to (I. L. R., 7 Cal. 531): "On the 12th December 1870, the Secretary of the Bengal Government addressed the Magistrate as ex-officio Assistant Superintendent, Tributary Mehals, in forming him that, as ex-officio Assistant Superintendent of the Tributary Mehals, he was empowered to take up for trial all

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offences committed within the Tributary Mehals not punishable with death, and to pass sentences not exceeding seven years, submitting his proceedings, in each case, to the Superintendent. Trials thus conducted were to be, as far as possible, in accordance with the Criminal Procedure Code.

"In 1872, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a Sessions Judge in Regulation Districts, and with power to hear appeals from sentences passed by any subordinate officer in Tributary Mehal cases.

"On the 30th April 1873, the Government of Bengal addressed the Superintendent of the Tributary Mehals, in answer to a letter, submitting a tabular statement of the powers then exercised by officers in the tributary estate of Orissa, and the powers which, in the opinion of the Superintendent, ought to be exercised in accordance with the spirit of the new Criminal Procedure Code, authorized the Superintendent to exercise the powers of Magistrate of a District and of a Sessions Judge under section 15 of the Act, and gave him power to hear appeals from sentences under section 36. The Magistrates and ex-officio Assistant Superintendents of Tributary States were invested with the powers of a Magistrate of the first class, and under sections 36 and 222 of the Code."

Upon the materials before us, we have, therefore, these facts established:—

(1.) The cession of Cuttack (of which Mohurbhunj is a component part) to the Government of the East India Company "in perpetual sovereignty" in 1803.

(2.) In 1804, 1805, several Regulations were passed by the British Government treating the Tributary Mehals as part of Cuttack ceded to them.

(3.) Legislative enactments were passed from time to time vesting officers under the British Government with power to decide suits of particular descriptions arising in these Mehals.

(4.) An engagement was executed by the Raja of Killa Mohurbhunj in 1829 to pay a certain amount of peshkush for the Killa, and to maintain himself in submission and loyalty to the Government of the East India Company.

(5.) With very insignificant exceptions, British officers administer criminal justice in these Mehals.

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In a case decided by the Judicial Committee of the Privy Council, reported in I. L. R., 1 Bom. 367—*Donardun Gurdha vs. Deoram Kanji*—a similar question arose, *viz.*, whether a village named Gangli, which was admittedly in British Territory, was ceded to a native sovereign or not? In the Province of Kattyad, the Thakur of Bhonnagur held certain taluqs which have never been brought under the ordinary administration of the British Government in India. For these taluqs, the Thakur of Bhonnagur used to pay certain tributes to the Peshwa and the Gaikwar. The rights of the Peshwa and the Gaikwar in these taluqs were transferred to the East India Company between 1802 and 1820. The judicial administration in these taluqs was left in the hands of the Thakur down to 1831. In that year, a Criminal Court of Justice in Kuttyad was established for the trial of capital crimes in certain cases, the sentence of the Court requiring confirmation by the Bombay Government. By an order of Government, the village Gangli was withdrawn from the ordinary jurisdiction of the British Courts of the Bombay Presidency, and made part of these taluqs belonging to the Thakur of Bhonnagur. It was contended that this act of Government amounted to a cession of Gangli to a native sovereign, *viz.*, the Thakur of Bhonnagur. The Judicial Committee held that this act did not amount to a cession of territory, but it was intended to confer upon the Thakur of Bhonnagur within Gangli as large a criminal and civil jurisdiction as that which he exercised in these taluqs. It is clear that the status of Mohurbhunj is very much similar to that of these taluqs of the Thakur of Bhonnagur. The Judicial Committee of the Privy Council was strongly inclined to the opinion that these taluqs formed part of British territory. This point was not expressly decided, because it was not absolutely necessary.

Some stress has been laid on the sunnud of adoption granted to the Raja of Killa Mohurbhunj by the British Government in the year 1862. But such sunnuds were granted to persons who are admittedly holders of mere zemindariés and jagirs (*see* Aitchison's Treaties, &c., Volume III., pp. 319, 320).

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On the whole, I am of opinion that Mohurbhunj is within British India.

The next question is, whether the conviction of the appellants is right, they not having been tried by the Superintendent of the Tributary Mehals.

I think the Tributary Mehals constitute by themselves a district within the meaning of the Criminal Procedure Code; and, by the Government Order of 1872, the Superintendent was vested with the powers of a Sessions Judge. I am of opinion, therefore, that, having regard to the provisions of section 70 of the Criminal Procedure Code, the conviction of the prisoners ought not to be set aside.

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PRINSEP, J.—I have had the advantage of seeing the judgments of all my learned colleagues in this case, but I regret to be unable, in any respect, to alter the opinions expressed by me in the case of *Harsee Mohapatro vs. Dinobundhu Moha Patro*, I. L. R., 7 Cal. 523: 9 C. L. R. 93. That case was decided by CUNNINGHAM, J., and myself after hearing the arguments of Counsel on both sides. In the present case the prisoners, appellants have not been represented; the case has therefore been decided on *ex-parte* arguments.

The points for our decision are—

First—Whether the territory of Mohurbhunj is or is not British India, as defined in the Statute 21 and 22 Vic., Cap. 106:

Second—If it is British India, whether the Indian Penal Code and the Code of Criminal Procedure are in force within that territory:

Third—If it is not British India, whether the prisoner can be properly tried in British India.

All these points were fully discussed and decided in the case of *Harsee Mohapatro vs. Dinobundhu Patro*, I. L. R., 7 Cal. 523; (S. C.), 9 C. L. R., 93, and, as, after hearing the matter re-argued by the law-officers of Government, and Mr. Mon Mohun Ghose on behalf of the Raja of Mohurbhunj, I see no reason to modify the opinion expressed in my judgment in that case, I do not propose to give the grounds of my opinion with the same fulness as I expressed them in that judgment. It will be sufficient

that I should briefly state them, and at the same time mention the reasons for which I altogether dissent from the opinions of the majority of my learned colleagues.

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I would first of all observe that it was no part of the argument in the case heard by CUNNINGHAM, J., and myself, that there was any difference between the status of Mohurbhunj and the other Tributary Mehals; and, though this distinction has been made by my learned colleagues in this case, I find myself unable, for reasons which I shall presently state, to agree in that opinion. It will, I think, be more convenient to deal with the case first as if no such distinction existed.

The Province of Orissa, as now known, together with the country termed the Tributary Mehals, was conquered by the British from the Mahrattas in 1803, and afterwards formed the subject of a treaty entered into with Chief of the Mahrattas, Sewa Sahib Rughoji Bhoonsla, on 13th December 1803, by which the country was ceded to us in "perpetual sovereignty." Treaties made by us during the course of the war with some of the Chiefs of the Tributary Mehals, who are described as feudatories of the Mahrattas, were confirmed by that treaty. Mohurbhunj was not among those feudatories who had joined us; but that is immaterial, as will appear from the narrative of subsequent events. The British Government then proceeded to legislate for this new territory, and passed Regulation IV. of 1804 to provide for the administration of criminal justice and the authority of the Police. We learned from this Regulation that our rule dated, not from the date of the treaty of 13th December 1803, but from that of the conquest of Cuttack—14th October 1803.

The Regulation deals with the "Province of Cuttack, including Balasore and the other dependencies of the said Province," and forms this country into the zillah or district of Cuttack with two divisions. Whatever doubt there may be regarding the inclusion of the Tributary Mehals as dependencies of the Province of Cuttack within the operation of this Regulation is removed by the Regulations passed in the following year. The Regulation IV. of 1804 was repealed; and three Regulations were passed (XII., XIII., XIV. of 1805) providing,

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respectively, for the revenue, criminal, and civil administration in the Province of Cuttack, and every one of these Regulations specially exempts the Tributary Mehals from the operation of those laws which it is declared shall not be "construed for the present to extend to the estates of certain hill or jungle Rajas or zemindars," of which a list is given. There would have been no necessity for this provision if the law of 1804 had not been intended to apply, and did not apply, to the estates of these Rajas or zemindars, and if, in the opinion of Government, the legislation for the Province of Cuttack would not otherwise extend to these estates.

The preamble to Regulation XI. of 1816, which was enacted to provide for the trial and determination of "claims to the right of inheritance or succession in certain tributary estates in Zilla Cuttack," also confirms this view. Act XXI. of 1845 is to the same effect, and so is the preamble to Act XX. of 1850, which recites that, "whereas certain jungle or hill zemindaries in the zilla of Cuttack enumerated in section 36, Regulation XII., 1803, of the Bengal Code, and the Territory of Mohurbhunj in the same zillah, are temporarily exempted by the said Regulation," &c., "and were temporarily exempted from the Laws and Regulations for the maintenance of the Police and for the administration of justice in criminal cases." The Act provided for the determination of boundaries of those zemindaries, not only as between them and what may be termed Regulation Territory, but as between one another.

This is all the legislation on the subject, and from this, to my mind, it clearly appears that all the Tributary Mehals have been regarded as country ordinarily subject to the laws in force under the British Government, but specially exempted "for the present" from their operation. The Tributary Mehals have also uniformly been described as estates or zemindaries in Zilla Cuttack, of which they were first made part by Regulation IV. of 1804. I regard the terms of the Regulations and Acts to which I have referred as clear and express on this point, and I cannot consider the legislation of the Government in thus temporarily exempting the Tributary Mehals from the operation of the General Laws and Regulations; in authorizing the

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Collector of Cuttack to conclude a settlement for the payment of a fixed annual quit-rent; in providing for the determination of all claims of inheritance or succession to those estates; in empowering the Governor-General in Council to prescribe rules for the guidance of such agents and their subordinates as he shall appoint, and for the powers to be exercised by them in civil suits and criminal trials; and in investing the Superintendent of the Tributary Mehals to determine all disputes regarding the boundaries between the several estates, as negative or of any doubtful meaning. If any further indication of the intention of Government is necessary, it is to be found in the orders passed by Government in 1814, when creating the office of Superintendent of the Tributary Mehals, which I shall presently quote.

I will next refer to what may be termed the executive or political action of Government with regard to the Tributary Mehals. Section 37, Regulation XII. of 1805, declared that "it shall be the duty of the Collector of Zilla Cuttack to conclude a settlement of that estate (*i. e.*, the lands known as the territory of Mohurbhunj) for the payment of a fixed annual quit-rent, on the principles on which a settlement has been concluded with the other hill or jungle zemindars specified in the foregoing section." These other zemindars are the Chiefs of the other Tributary Mehals.

In accordance with the terms of section 37, the settlement which appears in Aitchison's Treaties, &c., Volume I., page 184, was, in 1829, made with the Raja of Mohurbhunj. The engagements with the Rajas or zemindars of the other estates known as the Tributary Mehals were made several years earlier; in fact, they are referred to in section 36 of Regulation XII. of 1805, as having been already entered into.

Some stress has been laid on the terms of the engagement entered into by the Raja of Mohurbhunj in 1829, as showing that he was not a subject of the British Government. The engagement is similar in all its terms to those entered into by all the other Rajas, except the Raja of Keonjhar, and, as I have already stated, the engagements of all those Rajas formed the subject of section 36, Regulation XII. of 1805, and are

1882 mentioned as "settlements for the payment of a fixed annual
 EMPRESS quit-rent." The terms "estate," "zemindar," "settlement,"
 v. and "rent" applied to all the Rajas of the Tributary Mehals,
 KESHUB MOHAJAN, leave no doubt in my mind of their status with respect to the
 Judgment. British Government. I have already, in my judgment in the
 PRINSEP, J. previous case, noticed the terms in the engagement, which, in
 my opinion, do not bear the interpretation put on them by my
 learned colleagues. The Raja styles himself as "of Killa
 Mohurbhunj of Cuttack." Zillah Cuttack has, since its con-
 quest in 1803, invariably been a part of British Territory and
 British India, therefore the reference to Zillah Cuttack would,
 in my opinion, only be an additional indication of the fact that
 Mohurbhunj was, as set forth in Regulation IV. of 1804, a
 dependency of the Province of Cuttack, and from that time a
 part of that zillah. The expressions quoted from the treaty in
 the judgment of my learned colleagues appear to me of little
 significance. The succession to all these Rajas has always
 been assured to them, and the British Government has gone
 further to establish special Courts to determine claims to the
 right of succession or inheritance (Regulation XI. of 1826).
 The Government, moreover, in its desire to be guided by local
 custom, in 1826, circulated among all these Rajas 25 questions
 to ascertain the customs in their families, and their answers
 have always been used by our Courts in determining all ques-
 tions of inheritance in that part of the country. The papers
 known as the Pachees Sawal (25 questions) have always been
 regarded as authoritative by our Courts, and have more than
 once been quoted to me without any objection in cases tried by
 me in this Court. The expression "my successors" in the
 treaty engagement is thus easily explained. The country
 having sometimes been described in the Regulation as the
 territory of Mohurbhunj, I see no special force in the expres-
 sion "my territories." As regards the co-operation of "a
 contingent force of my own troops." I would only again refer
 to the preamble to Regulation XIII. of 1805, which describes
 the origin of the maintenance of such "troops," throughout
 Orrisa, and shows that, after all, they are merely police-levis
 kept for the protection of the country. The Orissa paiks are

well known to every one who has been officially connected with that part of India. The treaty engagement, too, is similar to those entered into by the other Rajas, which were referred to with approval in section 36, Regulation XII. of 1806, and this was a Regulation for the settlement of the revenue of the province or zillah of Cuttack. So far, then, as to its terms, I cannot regard this treaty engagement otherwise than as the result of the settlement which it was the duty of the Collector of Cuttack (section 37 of Regulation XII. of 1805) to conclude for the payment of a fixed annual quit-rent, not tribute.

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Next in order come the rules of 1839. These were prepared by the then Superintendent of the Tributary Mehals, Mr. H. Ricketts, and submitted by his successor, Mr. Moffat Mills, for the sanction of Government. The sanction was never accorded. Instructions were, however, issued that the officers were to act up to the spirit of those rules. I can find no authority for asserting that the action of these officers was to be exercised at the request of the Raja of Mohurbhunj or any other Raja. On the contrary, the Government officers have always assumed a superior authority up to the present day, which seems to me to go far to indicate the exact position occupied by all these Rajas. That such a state of things existed, and has been continued, is (to use the words of the Regulations of 1805), "owing to the rude and uncivilized race of people occupying those hill and jungle zemindaries," not, as has been stated, in consequence of any doubt on the part of Government regarding its true relations with that territory.

But, if it be necessary to refer to other evidence of the intention and policy of Government in their relations with the Tributary Mehals, I would quote the orders of the Governor-General in Council in 1814, when the appointment of Superintendent of the Tributary Mehals was created. These orders are particularly important from the early date on which they were issued, as well as from the occasion which called for them. The letter is addressed to the officer who was appointed the first Superintendent of the Tributary Mehals.

With respect to the office of Superintendent of the Tribu-

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tary Estates, your attention is desired to the following remarks and instructions :—

"Under the existing Regulations,* certain estates situated within the limits of the District of Cuttack are exempt from the operation of the general regulations, but pay a fixed annual revenue to Government.

* Sections 36 and 37, Regulation XII., 1805, section 13, Regulation XIII., 1805.

"The Governor-General in Council does not understand that such exemption was founded upon any claims which the proprietors of those estates have to the exercise of independent authority. On the contrary, his Lordships in Council apprehend that it originated entirely from the opinion which was entertained of the uncivilized manners of the zemindars themselves, and of the inhabitants generally of those places, combined with the nature of the country which was supposed to consist, for the most part, of hills and jungles. These circumstances, of course, render it extremely difficult to execute any process of the Courts of Judicature, or otherwise to give effect to any orders which the Judge, the Magistrate, or Collector, in the discharge of their public functions, may have occasion to enforce in any of those places.

"From this short review of the subject, it follows that the continuance of the above-mentioned estates on their present footing is a mere question of expediency, and that there is not anything in the nature of our connection with the proprietors of them which should preclude us from placing them under the ordinary jurisdiction of the Civil and Criminal Courts, should it any time be thought advisable, with reference to the points noticed in the preceding paragraph, to do so. It will, of course, be understood that, in adopting any arrangements of that nature, no alteration is to be made in the amount of the revenue payable by the proprietors of the above-mentioned estates respectively which has been declared (section 36, Regulation XII. of 1805), to be fixed in perpetuity.

"Under the circumstances above noticed, it will be one of the first objects for your consideration to inform yourself whether any of the Mehals to which the foregoing paragraphs

refer can be conveniently brought under the ordinary jurisdiction of the Civil and Criminal Courts, and to report the result of your enquiries on that subject to Government."

I further find from a selection of official papers published by Government in 1867 as "Papers on the Settlement of Cuttack and on the state of the Tributary Mehals," that various Superintendents have, from time to time, endeavoured to obtain the introduction of some definite law into the Tributary Mehals, the necessity being generally recognized, until, in 1839, some rules were proposed by Mr. Moffat Mills, the then Superintendent; but that the Government, probably for the same considerations as influenced them in enacting the Regulations of 1805, has hesitated to introduce any regular system. All these attempts were altogether in accordance with the directions of the Governor-General in Council in his orders of 1814, in which, by requiring the Superintendent then appointed to inform himself "whether any of the Mehals can be conveniently brought under the ordinary jurisdiction of the Civil and Criminal Courts, and to report the result of his enquiries on that subject to Government," he declared the policy of Government to be to make these Mehals, as soon as circumstances would permit, subject to the general law in force elsewhere.

It has been suggested that none of these Acts of Government show that they even took possession of this territory but that all that the Government has done is to exercise a sovereign control as the paramount power over the conduct of the Raja, and has allowed him to rule the territory as an independent State.

I cannot accept this view for the following reason:—

The British Government has repeatedly legislated for Mohurbhunj. The treaty engagement of 1829 was entered into under authority of a Revenue Regulation of 1805, declaring it to be the duty of the Collector to make a settlement with the Raja for the payment of a fixed annual quit-rent for his estate, and even to the present time British officers have assumed to themselves the sole right to try in British India even inhabitants of Mohurbhunj, for heinous offences committed by them in Mohurbhunj. Added to all these facts, we have the orders of Government of 1814.

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These papers of 1814 were not placed in my hands when I decided the case of *De'nobundhu Patro vs Hursu Mohapatro*, I. L. R., 7 Cal. 523, and I refer to them with much satisfaction as confirming the opinions I then expressed and still entertain. Moreover, when, even up to the present day, officers of Government are directed to try in (what is beyond question) British India inhabitants of all these Tributary Mehals whenever charged with any heinous offence, I cannot agree that there has been any *consensus* between the British Government and the Maharajah of Mohurbhunj that the territory of Mohurbhunj should be no part of British India.

The last public document is the sunnud of Lord Canning of 1862. The right of adoption which it confirmed was one which I have already shown has been recognized by the British Government since 1829. MITTER, J., has further pointed out that similar sunnuds were granted to individuals who were undoubtedly British subjects.

No special importance can, in my opinion, be attached to the grant of such a sunnud. It has not been contended that this sunnud made any alteration in the previously-existing status of the Raja, or that at any time there has been anything amounting to a cession of territory to the Raja, but it has been stated that this sunnud is an indication that Government dealt with this territory as independent, and not as British territory, and that it is in evidence that it has, at no time, formed part of British territory. Such an interpretation is certainly not consistent with the Government orders of 1814 already quoted by me. But, for the reasons above stated, I can attach no force to that sunnud.

Other papers, however, and official correspondence, have been laid before us. So far from the Government having, as has been said, concurred in considering and treating this territory as no part of British India, I find that more than one Lieutenant-Governor of Bengal has not only insisted on its being under his government, but has repudiated the idea of its being independent. There has certainly been no such admission, though other Lieutenant-Governors have allowed the matter to remain in doubt. The exemption of this territory from the

ordinary legislation and the application to it of special legislation on special subjects seem to me, as I stated in my previous judgment, rather to show that it has always been regarded as under our dominion and government, and I am confirmed in this opinion by the orders of the Governor-General in Council passed in 1814 which I have already quoted. There is no precedent that I am aware of, in which our relations with any foreign States have been regulated by legislation, or that which has been termed our paramount "power" has been exercised in this manner. Legislative powers have been given by Statutes from time to time to be exercised over our own subjects and within our own dominions.

For these reasons I agree with MITTER, J., that Mohurbhunj, like other Tributary Mehals, is in British India, but I regret to differ from him that all Acts extended to British India apply also to it. It appears to me rather these territories have been expressly placed beyond the ordinary legislation; and that, until this exemption has been specially removed, the laws in force generally throughout British India are not in operation in those parts. That the Legislature recognized such a contingency, will appear from the preamble to Act XVI. of 1874.

I am further unable to find any distinction between Mohurbhunj and other Tributary Mehals as regards its relations with Government. As I have before stated, this was never asserted by the Advocate-General or the Standing Counsel when they appeared before CUNNINGHAM, J., and myself in the case of *Dinobundhu Patro vs. Hursu Mohapatro*, I. L. R., 7 Cal. 523. But because Mohurbhunj was separately dealt with in Regulation XII. of 1805, and because the treaty or engagement with the Raja was not entered into until 1829, several years after those with the other Chiefs of the Tributary Mehals, it is sought to make some distinction between them and Mohurbhunj.

The reason why Mohurbhunj was separately dealt with by Regulation XII. of 1805 appears from the terms of the two sections 36 and 37, which refer to it and the other Tributary Mehals. The Regulation was for the settlement of the land revenue of the district of Cuttack. Section 36 confirmed the

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settlements for the payment of a fixed annual quit-rent by the zemindar of the Cuttack estates, all mentioned by name, and since known as the Tributary Mehals of Cuttack; and as no such settlement has been made with the Raja of Mohurbhunj, section 36 empowered the Collector of Cuttack to make a similar settlement with him. This settlement was the result of the treaty or engagement of 1829, which, as I have already pointed out, is precisely similar in its terms with the treaties or engagements entered into with the Rajas of all the other Tributary Mehals except that of Koonjhur.

In conclusion, I must express my great regret at the unsatisfactory termination of this case. Not only has a bare majority of the Judges in a Bench of five overruled the opinions of four Judges that Mohurbhunj is in British India, but this has happened in a case tried *ex parte*. How far this may be considered binding is doubtful. But the result is the more particularly unsatisfactory, because the grounds upon which the decision of the majority has proceeded distinguish between Mohurbhunj and the other Tributary Mehals, and the relations between the Government and those mehals remain in the same position as they were before the hearing of this case. Lastly, the present case concerns British subjects under trial for an offence committed in Mohurbhunj, whereas the Government has assumed to itself the right of trying in Cuttack and other place out of the Tributary Mehals, residents of those mehals who cannot, in the view of the majority of my learned colleagues, be regarded as British subjects, whenever any offence of a serious character has been committed in those mehals. That was the jurisdiction which I had to consider in the case of *Dinobundho Patro vs. Hursu Mohapatro*, 1. L. R., 7 Cal. 523, but this point is not covered by judgments now delivered. How far the exercise of this power is justifiable, I need not at present determine, but to me it seems to negative this proposition that the Indian Government and the Maharajah have, for a long series of years, concurred in considering or treating these territories as no part of British India.

